American Bar Association Journal

July 1954

Annual Meeting and Dedication of American Bar Center
Chicago, August 16-20

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Contents

JULY, 1954

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The President's Page

William J. Jameson

▪ The two regional meetings this year at Atlanta, Georgia, and Portland, Oregon, received wide acclaim in their respective regions. The success of any regional meeting depends primarily upon two factors: the wholehearted support of the local sponsoring groups and the effective leadership of the director or general chairman. There was no doubt on either score at the meetings this year. Particular credit is due the directors, E. Smythe Gambrell and James C. Dezendorf, for eminently successful meetings.

It is becoming increasingly apparent at regional meetings, as well as at meetings of state and local bar associations, that the average lawyer is interested primarily in the institutes, workshops and panel discussions where subjects of value to him in his practice are presented in an interesting and practical manner. These programs were outstanding at both Atlanta and Portland.

Elsewhere in this issue is the announcement of the appointment by the Board of Governors of Whitney R. Harris of Dallas, Texas, to head the administrative staff of the Association. (Under a proposed amendment to the Constitution, his title will be Executive Director.) During the present year we have operated without a director. This has been possible only because of the complete co-operation of a very loyal and efficient staff at headquarters. With the move to the new Bar Center and an ever-expanding program, the appointment of an executive director was deemed necessary. The Administration Committee, under the chairmanship of David F. Maxwell, gave the selection of a director the most careful consideration and concluded that Mr. Harris combined the qualifications and experience essential for this important position. His acceptance has met with general approval.

The Board of Governors took action on two other significant projects at its May meeting. Reports have been received from various consultants in the Survey of the Legal Profession with specific recommendations. These recommendations were referred to the Committee on Scope and Correlation of Work with directions to assign them to the proper sections and committees of the Association or outside agencies. This is the next step in the utilization and implementation of the reports of the Survey of the Legal Profession.

The House of Delegates at the Midyear Meeting approved "in principle the necessity to regulate voluntary specialization in the various fields of the practice of the law for the protection of the public and the bar" and also the principle that "in order to entitle a lawyer to recognition as a specialist . . . he should meet certain standards of experience and education." The House delegated to the Board of Governors, subject to final approval by the House of Delegates, the "implementation, organization, and financing of a plan of regulation" to carry out such principles.

Pursuant to this action, the Board of Governors is recommending the adoption of a resolution providing for the creation of an agency of the Association to be known as "The Council of Legal Specialists." This resolution appears in full in the Advance Program for the Annual Meeting. All members who are interested in the subject of specialization and specialized legal education are urged to read the resolution and report, which will be considered by the House of Delegates at the Annual Meeting.

We have been particularly pleased this year with the support we have received from the lawyers in the armed services in our membership campaign. I had the privilege in May of addressing the Judge Advocate General's School at Charlottesville. This school, located in the law school of the University of Virginia and having access to its facilities, conducts an advance course for twenty-five officers each year, and the course is equivalent to the requirements for a master's degree in law. It also gives an eleven-week orientation basic course to two hundred young military lawyers. The meeting of officer instructors and students I addressed at this school had the highest percentage of American Bar Association members of any meeting addressed during the current year. Over 95 per cent of the staff and faculty and over 85 per cent of the graduates of the school are members of the Association.

As of June 1, contributions in excess of $1,330,000 have been received toward our goal of $1,500,000 for the new Bar Center. Four thousand, three hundred seventy-one applications for membership have been received toward our minimum goal of 5000 new members.

American Bar Association Journal

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The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement of a member of the Association in good standing and are considered in each case by a Committee on Admissions of the appropriate state. If the applicant is a member of the Bar of the state or territory in which he resides or has his principal office, or is a member of a federal, state or territorial court of record of a state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of such states or territories. If, however, the applicant is not a member of the Bar of the state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of those states or territories or is referred to the Committee on Admissions for a state or territory in which the applicant formerly resided and to the Bar of which he was admitted. Upon the approval of an application by a majority of the proper Committee on Admissions, an applicant is deemed nominated for membership. All nominations made pursuant to these provisions are reported to the Board of Governors for election. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for memberhip in the following Sections: Bar Activities, Criminal Law, Judicial Administration, Legal Education and Admissions to the Bar, and the Junior Bar Conference. Dues for the Section of Administrative Law, the Section of Antitrust Law, the Section of Labor Relations Law and the Section of Patent, Trade-Mark and Copyright Law are $5.00 a year; dues for the Section of Taxation are $6.00 a year; dues for all other Sections are $3.00 a year.

Blank forms of proposal for membership may be obtained from the Association offices at 1140 North Dearborn Street, Chicago 10, Illinois.

American Bar Association

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Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

A Defender of Youth?

■ I read with interest Mr. Cullinan's sprightly dissertation on the current proposal that one should not be required to fight for his country if not allowed to vote. And I am sure we may expect a champion of youth to further enliven the discussion of this subject as the Bill for the Encouragement and Increase of Seamen in the House of Commons was enlivened a little more than two centuries ago by William Pitt's famous defense of youth in his debate with Horace Walpole.

With recollections of impressions formed in the 30's from Dorothy Thompson's column when it seemed to me she was adversely critical of capitalism, I read her article in the April JOURNAL with curious interest and was agreeably enlightened. Miss Thompson is a vigorous writer and her position on any subject is important, and I would like to know her views on political economy.

WILLIAM C. BROOKER

County Judge
Tampa, Florida

Says Professor Brown Ignores Logic

■ I am greatly pleased that the JOURNAL decided to publish "Lawyers and the Fifth Amendment, a Dissent".

The palpable lack of any foundation in logic or law for the position taken in the Brown dissent is convincingly disclosed by even a cursory reading of the article.

FRED E. FULLER

Toledo, Ohio

Professor Brown and the Syllogism

■ I read with great interest in the May, 1954, issue of the JOURNAL the article by Professor Ralph S. Brown, Jr. This article analyzes very carefully the problem facing the organized Bar in connection with members who refused to answer legitimate questions by special investigating committees as to whether they are Communists. The article criticizes the report of the Special Committee on Communist Tactics as well as the action of the Board in adopting same.

It is quite a tribute that the American Bar Association publishes both sides of every controversy. If more organizations did this throughout the country, all of the citizens would be greatly benefited. However, I noticed that Professor Brown bottoms his attack on the action of the American Bar Association through the use of syllogistic reasoning. Like most people who rely on this form of deductive reasoning, I think Professor Brown has fallen into great error in his final conclusion. He states the proposition thusly: "Lawyers should be above suspicion. So they should. And if a lawyer falls under suspicion, he should be disbarred. Wait a minute! Is this not a dangerous canon, that want of public confidence should be the measure of professional qualification?" He then discusses the proposition that want of public confidence is a dangerous yardstick to use in disbarring a member of our profession.

It is thus apparent that the Professor's deductive reasoning is faulty. The premise should be that lawyers should be above suspicion and if a lawyer does fall under suspicion because he refuses to answer a question as to whether he is a Communist or not, his case should be referred to the Grievance Committee and he should be given a hearing, and if he still refuses to answer or explain, he should be disbarred. The case which Professor Brown cites supports this correct reasoning. The case is *Matter of Grae*, 282 N. Y. 428. This case specifically points out that, while refusal to answer a question on the ground of self-incrimination raises no presumption of guilt, nevertheless if a lawyer does so refuse and thereafter is given a proper hearing by an appropriate Grievance Committee and still refuses to answer, he can be disbarred.

The Professor's fundamental error is that lawyers should be above suspicion not only because to be such merits public confidence, but because the very nature of the trust and confidence imposed in members of the Bar requires that they be above suspicion.

I am wholeheartedly in agreement with presenting both sides of all problems in the JOURNAL, but also believe that faulty reasoning should be corrected wherever it appears.

P. C. KING, JR.

Washington, D. C.

Activities of Sections and Committees

SECTION OF LABOR RELATIONS LAW

■ The Section of Labor Relations Law presented a program at the Portland Regional meeting on May 25. Arrangements were made by a committee of Portland lawyers, the co-chairman being William F. Lubersky and Donald S. Richardson.

The Federal Pre-emption of the Field of Labor Relations was the subject discussed by a panel, in which the following participated: Donald H. Wollett, University of Washington; James T. Landye, Portland; Robert W. Maxwell, Seattle, and Gunther Krause, Portland.

One of the highlights of the program for the Annual Meeting in Chicago will be a dramatic presentation of the subject "Conceptions and Misconceptions of Collective Bargaining". This will be presented by a committee selected from the Labor Relations Committees of the Illinois and Chicago Bar Associations, the co-chairmen of which are Joseph C. Lamy and John Byrne Chamberlin.

SECTION OF PUBLIC UTILITY LAW

■ At the spring meeting of the Council of the Section it was proposed to recommend an increase in the membership of the Council to twelve members and to reduce the term to three years. This proposal will be submitted to the Annual Meeting of the Section in August, 1954.

In view of the widespread interest in the work of the Hoover Commission and its impact upon the utility industry, it was proposed that this topic be given full consideration at the Annual Meeting. The Section has been most fortunate in having Whitney R. Harris, a representative of the Hoover Commission Task Force, as a guest on the panel which will develop and explore the influence of the Commission as it affects the utility field.

Senate Bill S. 1461, captioned "Quick Rate Increase Amendment to Interstate Commerce Act", was discussed by the Council and the Council went on record as approving the Bill and would seek permission from the Board of Governors in order to inform Congress of its point of view. The permission has been granted.

The program for the Annual Meeting was determined and, in addition to the topic already named, the following topics will also be considered: "Current Problems in the Regulation of the Transportation Industries" and "The Modern Approach to the Preparation and Trial of a Public Utility Rate Case".

SECTION OF JUDICIAL ADMINISTRATION

■ Justice Elwyn Thomas, of the Supreme Court of Florida, Chairman of the new Florida Judicial Council and a member of the Council of the Section, is cover-subject for the March issue of the *Florida Bar Journal*, which contains an article on the Judicial Council by Herbert U. Feibelman, of the Miami Bar. The seventeen-member council has by resolution approved a major study program to inquire into methods of relieving appellate court congestion, a nonpartisan plan for selection and tenure of judges, organization of and procedure in the trial courts, most effective use of jurors and other laymen, and administrative improvements in the judicial system. The Florida council is notable not only for the solidity and impact of its program, but for its distinguished membership and the vigor and industry of its members. Justice Thomas reports that the appetite of the council for work is insatiable. Its progress will be of considerable significance in the field of judicial administration.

Members of the Florida Judicial Council as appointed by Governor Dan McCarty: Elwyn Thomas, Judge of the Supreme Court, *presiding officer;* Herbert Bayer, political editor, Jacksonville; E. Dixie Beggs, attorney, Pensacola; N. Ray Carroll, banker, Kissimmee; C. E. Chillingworth, circuit judge, West Palm Beach; Howell Collins, general insurance, Tallahassee; Richard W. Ervin, attorney general, Tallahassee; Marion T. Gaines, editor, Pensacola; Richard J. Gardner, attorney, Quincy; S. Kendrick Guernsey, life insurance company president, Jacksonville; Bolivar F. Hyde, Jr.., theater owner, Lakeland; Robert L. McCrary, Jr., county judge, Marianna; William A. McRae, Jr., attorney, Bartow; Allen C. Morris, political columnist, Tallahassee; Perry Nichols, attorney, Miami; W. I. Stinson, Jr., hardware company president, DeFuniak Springs; and Leonard A. Usina, bank president, Miami.

SECTION OF MINERAL LAW

■ The Mineral Law Section of the American Bar Association held a Council Meeting at the Biltmore Hotel in Atlanta, Georgia, on March 4, 1954, at the time of the Southern

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(Continued from page 554)
Regional Meeting of the American Bar Association.

Those present at the meeting were as follows: Marshall Newcomb, *Chairman,* William N. Bonner, *Delegate to House of Delegates,* Hugh Fullerton, Lucius M. Lamar, Robert S. Palmer, Robert T. Patton, Robert E. Lee Hall, LeRoy H. Hines, *Secretary.* Others present were Scott Hughes and Martin A. Row.

The Mineral Law Section recognized the passing of Peter Q. Nyce, a charter member of the Section, a past Chairman, and its Secretary for twenty-five years.

The members voted unanimously to make a donation to the American Bar Association Building as a memorial to Peter Q. Nyce, and decided that any additional contributions would be left up to the individual members of the Section.

The Council confirmed the selection of William N. Bonner, of Houston, Texas, as the Section Delegate to the House of Delegates for Mr. Nyce's unexpired term. Mr. Bonner had been elected by a mail vote of the Council prior to the meeting.

The work and activities of the various Committees were discussed and the program for the Annual Meeting in Chicago on August 15-20, 1954, was considered.

Professor Wilmer D. Masterson, Jr., was the principal speaker at the sessions.

Mr. Newcomb, Chairman, made a report of the financial condition of the Section.

An Atomic Energy Committee of the Mineral Law Section of the American Bar Association has been recently appointed by Marshall Newcomb, Chairman. This is a most interesting and important committee and its recommendations will undoubtedly be watched with great interest.

The membership of the Committee is as follows: Charles I. Francis, *Chairman,* Clyde I. Martz, *Vice Chairman,* Robert S. Palmer, *Secretary,* Robert A. Ainsworth, Jr., New Orleans, Louisiana, Judge McIntyre Faries, Los Angeles, California, Hawkins Golden, Dallas, Texas, James K. Groves, Grand Junction, Colorado, Stephen L. R. McNichols, Denver, Colorado, Mitchell Melich, Moab, Utah, Martin M. Nelson, Chicago, Illinois, Oscar M. Reubhausen, New York, New York, William G. Waldeck, Montrose, Colorado, and Bailey Walsh, Washington, D. C.

Before appointing the Committee, Mr. Newcomb and Charles I. Francis, Chairman of the Committee, had numerous conferences with the representatives of the Atomic Energy Commission.

The Committee held its first meeting at the Brown-Palace Hotel in Denver, Colorado, on Friday, March 19, 1954, and discussed in some detail the policies and activities of the Committee. It was decided that at least four subcommittees would be appointed whose responsibilities would be in substance as follows:

The first subcommittee would concern itself primarily with the advisability of continuing government monopoly of the use of atomic energy, peacetime uses, and include studies of the manufacture of reactors. Mr. Reubhausen, of New York, was appointed chairman of this subcommittee.

The second subcommittee will concern itself with the patent system and the numerous ramifications involved therein. The Chairman of this Subcommittee will be Mr. Golden, of Dallas, Texas.

The third Committee will concern itself primarily with the history of atomic energy and developments and be charged with the responsibility of compiling a report. The Chairman of this subcommittee will be Mr. Walsh, of Washington, D. C.

The fourth subcommittee will concern itself with the numerous problems of raw material acquisition. Mr. Waldeck will be chairman of this subcommittee.

In addition to members of the committee, the following also attended the Denver sessions: Raymond B. Holbrook, *Chairman of the Hard Minerals Subsection,* Clair M. Senior, *Vice Chairman,* Kenneth C. Keller, Lead, South Dakota, Frazer Arnold, of Denver.

SECTION OF ADMINISTRATIVE LAW

■ Members of the Section worked long and hard to overcome the problem created by the Supreme Court's decision in *United States* v. *Wunderlich,* 342 U.S. 98 (1951). Their efforts were rewarded when President Eisenhower signed the bill which enacted S. 24 into law on May 10, 1954. While S. 24 does not meet the problem entirely, it is felt that it provides improvement. Under the *Wunderlich* rule, government contracting officers were clothed with almost absolute control over contract disputes which frequently involved millions of dollars. Under the new legislation, a final decision in government contract cases can be upset where it is found to be "fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence".

In reply to his letter to President Eisenhower urging approval of S. 24, Chairman Cragun received a courteous note from Special Counsel to the President, Bernard M. Shanley. The note advised of the President's approval of S. 24 and stated "knowing of your interest in the bill and desire to overcome the implications of *United States* v. *Wunderlich,* 342 U.S. 98, we felt certain you would be pleased to hear of the President's action in this matter".

Members of the Section who have been following the work of the Hearing Officers Committee of the President's Conference on Administrative Procedure will be interested to know that the final report and recommendations of the Committee will be submitted for debate at the next plenary session of the Conference to be held on October 14-15, 1954, in Washington.

American Freedom and the Law:

Fighting the Communist Menace

by **Kenneth C. Royall** • Former Secretary of War

▪ Starting with the premise that Communism is the greatest threat facing us today, against which we must protect ourselves at all costs, Mr. Royall warns that we must be concerned with the possibility of undermining our freedom by the very measures we adopt to protect it. This article appeared in the Autumn, 1953, issue of the *Southwest Review*, under the title "Liberty Before the Law", and is published here through the courtesy of that publication.

▪ America's greatest menace today is the combined Communism and totalitarianism of Russia and its satellites. Their prime objective is to destroy throughout the world our type of democracy and freedom. We must, to the limit of our ability, oppose these hostile forces as effectively as possible—oppose them at home as well as abroad.

Frankly, I would place absolutely no limit on doing anything—and I mean anything—which is necessary to protect us from these Communist forces, provided, however, that such protective conduct would not in itself endanger our nation.

Consider whether we now face the possibility of ourselves undermining the very American freedom which we are seeking to safeguard from others. Are we running a risk of undermining our American system to our own injury and the satisfaction of the nations which are today set against us? My particular phase of this subject is American freedom and the law.

As has been often said, the real test of our American system of justice is not whether we treat fairly those with whom we agree, but whether we treat fairly those with whom we do not agree. Are we meeting this test today? If not, what are and will be the results to our country? I would first like to follow what is sometimes called the case system, and recount from my experiences a few actual episodes. From these we may learn something about the problems that now face our American system of justice—and also perhaps something about the solution of those problems.

In my native Wayne County, North Carolina, about thirty years ago, a Negro from Philadelphia, together with some local friends, attempted to rob and actually did murder a country grocer. Feeling ran high, and in short order a white mob moved on the courthouse to lynch the Negroes.

Some younger members of the Bar and a few other members of the American Legion quickly got together and defended the courthouse. There ensued what is known locally as the Battle of Wayne Court House. The building itself suffered considerably from gun fire of many kinds, but the outnumbered defenders fought off the attack and seriously wounded the leader of the mob.

Some days thereafter the accused Negro was tried—this time with a National Guard company protecting the square from another growing mob. Upon a confession and other clear evidence, the defendant was promptly convicted and later executed—despite the best efforts of counsel appointed by the court.

An interesting sequel came a few months later. The leader of the mob had lost his leg in the courthouse battle. Despite this fact, he was tried and promptly convicted of inciting to riot, and was sentenced to—and served in—the state penitentiary—the sentence being rendered in the same courthouse he had attacked.

This episode left several indelible impressions on my mind. First, the impassioned, cruel, bloodthirsty and inhuman faces of the lynch mob—a mob bent on death beyond the law to a fellow human being—death to him largely because he was a member, though an unworthy one, of a minority and then overawed race.

On the other side of the picture, I still envision the determination of that small group of good citizens who successfully fought off the mob—and who thereafter, despite the tumult around them, calmly and legally and successfully proceeded to punish the lynch leader.

But in weighing the whole occurrence then—and in weighing it now—one cannot avoid the conclusion that even if the guilt of the defendant had been doubtful, and if in addition the good citizens of the community had been slightly less firm and courageous, then the mob spirit among some members of a normally decent and God-fearing community would doubtless have unjustly taken the life of a human being. Or—worse still—a jury might well have been swayed or intimidated by the passion of a mob and might have unjustly doomed an innocent man to death.

Other incidents of this kind have unfortunately happened in America under the same or some other type of passion or prejudice or bigotry or intolerance. They may involve matters of life and death, as in the case of the Battle of Wayne Court House, or they may involve injust imprisonment or loss of property—or they may in whole or in part concern an individual's right freely to follow his chosen vocation or to earn a decent livelihood.

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No one ever questioned the propriety of punishing war crimes recognized by rules of warfare. But in 1944 and 1945 some people challenged—and many more now challenge—the right at the end of the war to create an entirely new capital crime and then try men retroactively for this new offense. One attorney, when asked in late 1944 about prosecuting such a charge, protested that no one could be properly charged or tried for starting a war for the following reasons, among others:

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So much for the past. How about the present? The problem confronting us today is perhaps the most difficult of all. We are confronted with a vicious determined nation and its satellites, who have not only promoted the present war against us but are also in every way and on every day seeking to destroy our nation and our freedom and way of life. They infiltrate or try to infiltrate into our businesses, into our labor unions, and into our government and elsewhere.

This danger—and it is a real one—must be effectively met. Most of us agree unqualifiedly that preservation of the United States is our paramount duty. And we are not squeamish about taking any course—extreme or not—against any person or group—any course that is necessary to guarantee a preservation of our country and its freedom from foreign enemies in peace and in war. Nor do we op-

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pose adequate punishment, after a fair hearing, of any who are proved to be traitors to our country or to be seeking overthrow of our government.

But while we are preserving our nation and our system of government against Russia and her satellites, we must pause and think why we are doing so. It is not merely to keep us prosperous—or to keep crop prices or stock prices up. It is not at all for the purpose of supporting conservative American democracy and condemning liberal democracy. Nor is it so that there be an iron barrier against every new idea. Our purpose is to preserve all of our traditional American freedoms, including particularly freedom before the law, which Russia doesn't practice or believe in.

We Must Not Destroy the Freedom We Are Guarding

We must, therefore, be certain that in the process of dealing with outside forces or internal subversive activities we do not ourselves by our own conduct destroy from the inside the very freedom we are striving to protect. We must not by unjust oppression of either our citizens or others place our nation in the same category as those nations whom we are opposing and whose philosophy of government now seeks to destroy ours.

In spite of the many lessons of the past, our fairness and our system of justice are today facing an old dilemma with a slightly different garb. Today free speech and free thought seem to be unjustly curbed by intolerance, far beyond what is required for defense against Communist tactics which tend to be destructive of our democratic freedom. This course we must not follow.

In the area of freedom before the law, the savage faces of the lynch mob, the bitter bigotry of the Al Smith campaign, the attempted post-war program against Germany are today partly transformed into a studied campaign of hate against many patriotic liberals—against many who are frequently better Americans than some who attack them.

Under a legislative immunity, unjust character-destroying attacks have been made on innocent people, these attacks often being skillfully camouflaged by other attacks that are justified. Reckless rumors have run amok in public places and in the public press. By law or by edict, far-reaching presumptions have been prescribed, which at least tend to encourage and facilitate questionable convictions in court—or deprivation of the earning power of guiltless people.

All this has the effect—and often is so designed—of making fair trials more difficult in cases where there is a bare whisper of subversion, but no real evidence. The indiscriminate hue and cry in the land tend to breed timidity in juries and even in ear-to-the-ground judges, if any there be.

Lawyers, heretofore courageous, have become reluctant to represent honest and patriotic men in meritorious cases, because such lawyers fear that they will be subject to attack and that some of their conservative clients will desert them. These situations are not, of course, universal, but they do exist and they do indicate a dangerous trend that good citizens must try to stop.

The trend cannot be stopped by the mere form and trappings of trials and hearings. It makes farcical justice to say: "Give the scoundrel a fair trial and then hang him"—or, today perhaps, "Give him a fair hearing but be sure to destroy his character and means of livelihood."

Our action in defense of American liberty before the law must be a positive one. May I close with a few short suggestions?

First, let us all join in discouraging public or private accusations of disloyalty—or any other charges—which are exaggerated or not based on facts. This applies whether the charges are made in Texas or New York or Washington or elsewhere, or whether the charges are made by public officials or by private citizens.

Encourage in every way a really fair and unbiased hearing for every person charged locally or nationally with a crime or threatened with dismissal from his position—and also every person unjustly or dubiously pilloried before any public body.

Encourage the leading lawyers of your community as a patriotic duty to see that every person accused in any forum, judicial or otherwise, is offered capable representation at his hearing, particularly if the charges are based on intolerance or rumor.

All of us are strongly anti-Communist and antitotalitarian. Most of us, I would guess, are even strong conservatives, at least at heart. We must—and we will—continue to oppose the Marxian philosophy and its practices on all fronts, at home and abroad. And we will oppose this philosophy successfully.

But we also want to preserve in our America the true spirit of freedom before the law. We want to demonstrate, not only to ourselves, but also to others that our free system will work successfully under hard conditions as well as easy. Only by such demonstration can we keep —and draw—other nations away from Communism. Only thus can we convince ourselves as well as others that our free system of government offers the greatest hope for all the people of all the world.

The Courts of Last Resort in Tax Cases:

A Specialized Court of Tax Appeals?

by Robert N. Miller • of the District of Columbia Bar

■ From time to time the suggestion has been made that a court of tax appeals be established to relieve other federal courts of the burden of handling highly technical, complex tax questions. Mr. Miller examines the merits of this proposal, setting forth considerations weighing on both sides.

■ Ought federal civil tax appeals to be taken away from the eleven Courts of Appeals and entrusted to a newly constituted appellate court?

From quarters worthy of respect, this suggestion has been made from time to time.[1] The new court would have to be a specialized court deciding only civil tax cases, because of the probable case load on such a court. The suggestion is that it be composed of from seven to nine members.

Proponents refer to a variety of instances in which a point of tax law has been decided in one circuit court and then after a long interval has been decided the other way in another case by a different circuit court—so that the Supreme Court, because of the conflict, at last granted certiorari and gave attention to the issue.[2] This possibility of a slow-developing conflict as to any point is undoubtedly one of the important reasons for slowness and uncertainty in developing court-made tax rules. Proponents of the new court, attributing nearly all of these delays to this cause, feel that a high degree of prompt finality and certainty could be attained by this plan to eliminate conflicts.

The proposal raises questions wider than the tax field. Conflicts between circuits play a part in the process of interpreting many complicated federal measures, such as the antitrust laws, labor laws and laws about the issuance of securities. A single specialized court dealing with those matters would avoid such conflicts, as it would in tax matters, but there appear to be sound reasons for concluding that such centralization would furnish no desirable solution either in the tax or the nontax field.

The present discussion, limited to taxation, reviews some of the relevant considerations, including available figures as to the working of the present tax system.

Such questions as the following need to be considered in appraising the suggested plan:

What important causes of delay and uncertainty are operating, other than the present existing possibility of conflicts?

Would establishment of the new court keep these other causes from operating?

How reliable is the assumption as to the finality of the new court's views?

Would it be wise to give the last say in court-made tax law to a specialized court?

I

The Causes of Delay

Is it true or not that delays in getting court clarification of tax principles would to a substantial extent be eliminated by doing away with the possibility of conflict?

The answer seems to be that the most important causes of delay and uncertainty are not related to conflicts.

The major reasons why courts are slow in clarifying tax principles are inherent in the total problem and cannot be removed by any simple cure. There are, first, preappellate delays which are usually much longer than appellate delays and which

1. See Griswold, "The Need for a Court of Tax Appeals", 57 *Harv. L. Rev.* 1153 (1944); more recently, Pope, "Do We Need a Court of Tax Appeals?", 39 *A.B.A.J.* 275 (1953).

The House of Delegates of the American Bar Association voted its disapproval of the proposal, 69 *A.B.A. Rep.* 144 (1945). The printed report of a committee of its Taxation Section is available at the office of the Association.

2. See Griswold, *supra*, Note 1, at pages 1157-1161.

are of very uncertain length; second, uncertainties due to the fact that some of our tax rules are made by Congress and some by the courts, and that these two authorities have very different points of view and sources of information; third, the fact that the process by which any court of last resort stabilizes any one rule or principle of court-made tax law is almost always a slow and complicated process, because a whole series of decisions on different but related states of fact is usually needed —the intervals between such decisions being fortuitous and often long; and, finally, policies of the Treasury which are inconsistent with stabilization — exemplified in the Treasury attitude toward Supreme Court decisions.

Light on the working of our present system is available from published studies.[3] Following the publication in 1944 of an article ably advocating establishment of the new court,[4] Mrs. Madaline Remmlein, at the suggestion of the late Sewall Key, made a careful study of the period 1939-1947, inclusive. Some of her findings are stated below:

> Of all the civil tax cases decided by Courts of Appeals in that eight-year period, about 3.8 per cent were involved in conflicts; more than 94% of the decisions of the Courts of Appeals did not go to the Supreme Court at all.
>
> During that period the Supreme Court handed down 173 opinions in civil tax cases, of which 113 were conflict cases involving 80 conflicts. Thus 34.7 per cent of the cases considered by the Supreme Court were accepted by that court for reasons other than the existence of conflict.
>
> The average conflict-developing period was two years. Fifty per cent of the conflicts developed in less than one year. Slow-developing conflicts were thus exceptional.
>
> Considering these 173 Supreme Court cases with respect to the total time elapsing between the taxable year involved and decision in the Supreme Court, the total elapsed time in the typical case, that is, the median case, was made up as follows:
>
> *The pre-appellate stage, 5.2 years*
>
> (a) The strictly administrative stage, culminating in the issuance of a deficiency letter or in an assessment, about 3.7 years.
>
> (b) The *nisi prius* stage in the Tax Court or a District Court, about 1.5 years.
>
> *The appellate stage, 1.55 years*
>
> (a) The Courts of Appeals stage, ending with decision in one of those courts, about 9½ months.
>
> (b) The Supreme Court stage, about 9½ months.

Real as is the part played by the possibility of conflicts, its lack of *relative* importance in the appellate tax system becomes evident when we realize (1) that less than 4 per cent of the cases dealt with by the Courts of Appeals became involved in conflicts, (2) that, of the cases in which certiorari was granted, about one third did not involve conflict, and (3) that about three fourths of the total delay between taxable year and final resolution of conflict in the typical case was preappellate. In view of these facts, it would be surprising if a proposed solution turning on the elimination of conflicts could be importantly effective; the causes of uncertainty lie so much deeper.

The Handicap of Courts as Makers of Tax Law

The third of the previously listed causes of uncertainty perhaps needs explanation. After a tax question finally reaches an appellate court, an intrinsic handicap peculiar to courts comes into play—that each court decision relates only to a special set of facts, usually far from typical, so that any single decision, even of the highest court, seldom gives assurance as to what the court will do on different facts, even when the same principle seems to be involved. Because of this, the process by which one gets *from the courts* a new and dependable tax principle of any real breadth is not a short one. There is inescapable uncertainty as to how long it will be before enough cases involving different but related fact pictures will have come up for decision so that the various decisions can become the basis of a general rule.

To mention one among many instances, the Supreme Court's decision in a family partnership situation in the year 1932 left considerable doubt as to what the rules applicable to family partnerships ought to be.[5] In 1946 the Supreme Court decided two other family partnership cases.[6] In 1949 another family partnership case came to the Supreme Court,[7] and no one knows at this time when the next case, giving further necessary light, will ripen.

The immense variety of fact-situations which are presented in tax litigation makes this disability of the courts more acute as to taxes than in other fields of litigation. A special Tax Court of Appeals, if created, could do no more than the Supreme Court can in the way of giving breadth to each of its own tax decisions. Before final principles emerge with certainty, it must, like the Supreme Court, make a series of decisions on specific facts at irregular and uncontrollable intervals, as cases happen to come before it.

The Government as Partisan

The last of the listed reasons why any single decision of a court of last resort seldom has any broad settling effect is the litigious policy of the Government. The United States must be its own partisan in the tax field, and this partisan tendency tends to keep the court-made rules of tax liability unstable.

When a court of last resort such as the Supreme Court decides against the Government on an issue of tax law, the Government, acting in its partisan capacity, generally does its subsequent tax auditing not on the basis of the general trend of the opinion but on the theory that the case is to be limited to its own peculiar facts;[8] this of course gives rise to

3. Remmlein, "Tax Controversies—Where Goes the Time?", 13 Geo. Wash. L. Rev. 416 (1945); Remmlein, "A Time Study of Certain Tax Controversies", 16 Geo. Wash. L. Rev. 238-251 (1948).

4. Griswold, "The Need for a Court of Tax Appeals", *supra*, Note 1.

5. *Burnet* v. *Leininger*, 285 U. S. 136 (1932).

6. *Commissioner* v. *Tower*, 327 U. S. 280 (1946); *Lusthaus* v. *Commissioner*, 327 U. S. 293 (1946).

7. *Commissioner* v. *Culbertson*, 337 U. S. 733 (1949).

8. ". . . The only policy which emerges is a policy of litigation, as arguments are molded to suit the exigencies of the particular case." Eisenstein, "Some Iconoclastic Reflections on Tax Administration", 58 Harv. L. Rev. 476, 490, 501, 544 (1945).

new litigation. This litigious policy is the reason why the executive branch of the Government, far from pursuing a policy of stabilization, is found arguing in one case *for* some disputed tax principle and in another case *against* that principle.[9] That policy largely accounts, also, for the fact that in Tax Court cases the final outcome shows that the Government has demanded in its deficiency notices about twice as many dollars as were actually owing to it.[10]

As to some questions, the Government even tries to get the same question back into the same high court later with somewhat different fact-details, in the hope that the high court, having possibly in the meantime undergone some change in personnel, will prove to have a majority leaning the other way. To give one instance, the Supreme Court in the *General Utilities* case[11] said that when a corporation declares out to stockholders, as a dividend, property which has appreciated in value since the corporation acquired it, the corporation makes no profit by so doing. Notwithstanding this, the Bureau continued to take the position that the corporation would realize taxable income by such a transaction, hoping to get the same question again before the Supreme Court and that a changed view would emerge. The fact that the Government refrains from asking for the writ in various cases which it loses in Courts of Appeals, and yet refuses to follow the decisions, is another indication that the Government is not seeking stabilization. It seems idle to hope that the mere establishment of a new court would convert the Government to a wholly new attitude of submissiveness.

II

"Finality"

Could the Supreme Court accept the views of the new court as final?

Proponents of the plan do not press for any statutory impairment of a litigant's present right to seek review by the Supreme Court.[12] They appear to feel that the Supreme Court would nevertheless narrow its policy with respect to granting certiorari in tax cases if the new court were set up. Sometimes this feeling is based on an assertion that "one answer is as good as another as a guide for the future".[13] But if the *new court* were to approach its duties holding the theory that one answer is as good as another, litigants would be justified in working for its abolishment, because a court needs to have a higher purpose—of correctly applying the tax law and preventing the authorities from going beyond it. A litigant's stake in getting a correct—as distinguished from a merely final—decision is important to him or he would not have started proceedings.

While the Supreme Court cannot and does not undertake to correct all errors of law made by inferior courts, the continuance of present provisions as to certiorari would leave it with the duty of distinguishing between substantial and less substantial questions of tax law, and of accepting the important and substantial ones for consideration on certiorari.

Furthermore, without a change in the statutes the Supreme Court could hardly, with any degree of wisdom, discriminate against taxpayer-litigants by adopting a tighter policy in dealing with petitions filed by them than it follows in dealing with petitions filed by persons claiming to be injured by misconstruction of statutes outside the tax field.

Even if the Supreme Court were to narrow its policies as to petitions filed by taxpayers, it seems reasonably sure, in view of Mrs. Remmlein's finding that about one third of the writs granted in the cases she studied over an eight-year period were in nonconflict cases, that some writs would be granted to review interpretative decisions of the new court, on the ground that the questions involved are substantial and important. Thus there would always be the possibility, as to any principle announced in an opinion of the new court, that the Supreme Court, although properly refusing a writ in that case, would nevertheless at a later time feel impelled to grant a writ in some other case touching on the same principle but involving a different state of facts—a fact-picture which shows, as the other state of facts did not, that the principle is of public importance. This would involve the same kind of unpredictably long period of uncertainty which now exists.

And since this delayed review

Chase Ltd., Photo

Robert N. Miller was born near Louisville, Kentucky, received his LL.B. from Harvard Law School in 1906 and served as Chief Counsel of the Internal Revenue Service in 1919-1920. Since that time he has been in practice in Washington, D. C. He served as Chairman of the Committee on Taxation of the American Bar Association and is active in the Section of Taxation which succeeded the Committee. He is a member of the Council of the American Law Institute and of its policy group for the tax project.

9. See *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 42 (1939), in which it appeared that the Government argued one way in one case and the opposite way in another, because "it is unable to determine which construction of the statute will be most advantageous to the Government in point of revenue collected".

10. See Paul, "Directions in Which Tax Policy and Law Have Been Moving", 30 *Taxes* 949, 951 (1952).

11. *General Utilities and Operating Company* v. *Helvering*, 296 U.S. 200 (1935).

12. Griswold, "The Need for a Court of Tax Appeals", *supra*, Note 1, at 1168.

13. Pope, "Do We Need a Court of Tax Appeals", *supra*, Note 1, at 277.

might occur as to any decision of the new court or any principle developed by it, the fact that as to any one decision the *chances* of review were lessened would not wipe out the danger that of all decisions that particular one might be chosen for review. Merely to diminish the average number of cases reviewed is not to give any particular ruling effective finality.

III

Specialization in a Court of Last Resort

Is it wise to seek to give a specialized court the last say as to court-made rules governing tax levies?

Inevitable as it is that the courts, until Congress speaks, will have the last word as to tax burdens which have been left ambiguous by Congress, our best reliance for this important interstitial legislative service would seem to be on nonspecializing judges who are in day-to-day contact with the full judicial problem of interpreting the whole range of congressional enactments.[14]

Specialists play an important part in our economy and in our government, but it is observable that the top executives in great corporations and in government are not generally chosen from the ranks of specialists. This is because any person who specializes almost inevitably develops limitations which prevent his exercising the broadest kind of judgment.[15] Thus, although Congress employs tax specialists and gives careful thought to what they say, finished statutory provisions are found to deviate at various points from the advice of experts, reflecting instead the views of constituents, politicians, and of the public generally.[16] A court, of course, needs to follow the will of Congress—not to bring the statute back to where experts would like to see it.

It is also common experience that specialists in any line tend to become insensitive to influences which require change. The man who is a qualified specialist in the tax ideas of Congress today or next year is not likely to adjust himself easily in 1963 or later to the ideas which Congressmen then express in new tax laws—keyed to changing public sentiment and changing governmental problems. A judge who does not think of himself as primarily a tax judge is not so handicapped in his necessary task of ascertaining the will of Congress.

A sharp difference is evident between reliance on specialist judges at the trial court level and at a last-resort level. The Tax Court of the United States, for instance, is a successful link in our judicial chain, but it operates under the control of the nonspecialized judges of the Courts of Appeals—not merely seeking to conform to what they say, but having in mind the likelihood of reversal if, when dealing with new problems, they should go too far along specialized lines not definitely authorized by Congress.

Nor is the suggestion sound that when Congress does not like what the new court does, "Congress will promptly amend the law to provide otherwise." Congress almost always refuses to make tax legislation retroactive to any great degree; the normal result would therefore be that the victim of a court decision which is out of line with the real sentiment of Congress would remain the victim of uncorrected error even if Congress enacted legislation putting the principle back to the position from which the court had dislocated it. It is also true that Congress does not give its attention, in general, except to questions in which the Treasury or a large number of people are interested. Is not this suggestion that Congress is ready to pick up the pieces somewhat like saying that it does not matter much if a man makes himself ill, because probably physicians will be available to cure him?

IV

The Proposed Appellate Centralization

Increased centralization in government seems to involve the loss of many useful values. In the appellate part of our judicial system, the present courts of appeals are a valuable citadel of localized federal government. To illustrate, suppose a taxpayer of the Fifth Circuit feels that he is the victim of the Treasury's partisan policy. He carries his case to the Fifth Circuit, knowing that it will be considered by judges who have learned conditions as they are in his own area by daily contact with its citizens and its problems. He understands that other judges may know—or know where to find in books—the technical law, but he also understands that judges need to know more than this—a kind of detailed practical wisdom which is a wholly different thing. If his case involves community property or oil or gas operations or cattle-raising or lumbering or other business operations common in his area and not so common elsewhere, the taxpayer understands that a judge who has an everyday background in the details of these matters is a better judge because his decisions are not made *in vacuo,* and litigants know that they are not.

Each area, of course, has special backgrounds in merchandising or investment management or manufacturing or mining or fruit-growing. The more a judge knows about the special problems of the area where he presides, the wiser and more acceptable will be his decisions.

The proposal to centralize tax cases at every appellate stage obviously goes counter to all of this. If it

14. The existing Court of Customs and Patent Appeals is not analogous. As to patent law its decisions have little finality, because its narrow jurisdiction leaves important patent questions to be decided by other federal courts. Decisions as to customs relate mainly to valuing and classifying imports. Comparatively few people are directly concerned with its decisions—importers, inventors, and proprietors of patents.

It may be noted here that a specialized court known as the "Commerce Court"—not an appellate court—was established in 1910; it was not a success and was abolished in 1913.

15. Compare Rifkind, "A Special Court for Patent Litigation?", 37 *A.B.A.J.* 425 (1951); Judge Rifkind observes at page 425: "Once you segregate the patent law from the natural environment in which it now has its being, you contract the area of its exposure to the self-correcting forces of the law. In time such a body of law, secluded from the rest, develops a jargon of its own, thought-patterns that are unique, internal policies which it subserves and which are different from and sometimes at odds with the policies pursued by the general law."

16. "If experts were to make the basic policy for any considerable period of time, it would undoubtedly become too far removed from the desires of the public to be acceptable." Blough, *The Federal Taxing Process* 139 (1950).

were adopted, the litigant would not find, anywhere in the appellate system, the values he now owes to decentralization.

V

Overemphasis on Litigation Phases of the Tax System

Our own professional group which includes lawyers and judges has to be careful not to overdignify the part played by courts in our tax system, or the importance—to us—of the especially interesting points of tax law which get into court. Those disputed points are really few in number as compared with the vast number of other tax rules which need no court attention except as to fact issues arising under them. Thus, although millions of tax returns were filed, the circuit courts gave only 2,536 decisions in civil tax cases in the eight-year period which was studied—an average of less than 320 cases a year.[17]

The primary concern of a government which needs large tax collections is not with these disputed points or even with court-made tax law. What it must do, at all costs, is to maintain such good will for its tax system that almost all of its tax money comes in without controversy—without even administrative controversy. About 94 per cent or more of our income tax money does so come in now.

To assume that the courts are brought into our tax system mainly to clear up doubtful points of law would be to assign the courts undue importance in that system. They are there for the taxpayers' benefit—to protect them from overcollections by the executive branch. Thus, the Government, having been granted summary powers of enforcement, is not allowed to bring any action whatever in the Tax Court or in the Court of Claims—nor even in the District Court, except in a few situations where summary enforcement is not permissible. With those exceptions, rule-making as to tax liability is required of the courts only where a *taxpayer* invokes their attention.

It is thus important to recognize that litigation is a minor phase of our system, however essential a phase. Hope for good effects from any proposed change as to appellate litigation has to be weighed against accompanying disadvantages which concern a much more vital matter—the working of the whole system as a large-scale producer of revenue.

VI

Other Questions

Space does not permit discussion of other questions of importance, including the following:

> In view of past experience with both Republican and Democratic Presidents, how reliable is the assumption that appointments to the new court would be uncontaminated by politics?
>
> Would it be possible for the new centralized court to do its work if it undertook to travel about the country, so that its hearings would occur at places and at intervals somewhat as hearings occur in the Courts of Appeals?

VII

The Burden of the Judges

Finally, attention must be given to a thought that more than one conscientious and public-spirited judge has expressed; that is, tax questions are not merely complicated but are "technical" in such a sense that there must be, somewhere, a group of men to whom the burden of tax appeals can be shifted—specialists who could deal with them better and with less wear and tear than can nontechnical judges.

To give the judges this relief would be feasible if experience gave any real hope of finding or developing a group of specialists with the necessary combination of technical abilities and broad judicial wisdom. But experience with specialists and with tax questions affords no ground for such hope.

Cases do come to the high court in which technical tax knowledge would be helpful, but, in general, the workable answer to the kind of tax question which is commonly involved in conflict of opinion would not come from an intimate knowledge of the tax statute nor from any kind of technical knowledge, but from sound general judgment.

A court decision, to give one instance, often turns on judicial policy as to how far the courts shall compete with Congress in making tax law. Thus a court, inclined to close what it considers a "loophole", must ask itself: Is this the kind of case in which the courts are justified in stepping in to make a tax rule which Congress refrained from making? This is not a question for specialists.

Very often, too, the courts must reach their conclusions in the light of public policy or of what may appeal to the public as common sense. As an example, consider the case in which the Supreme Court was forced to decide whether a manufacturer of eyeglasses could deduct, in computing net income under the statute, amounts paid to physicians who sent customers.[18] As another example, consider the question of correctness, under the terms of existing tax law, of the Commissioner's published ruling that when a father gave to his son certain cows which the father had raised, the father realized taxable income at the moment of gift equal in amount to the market value of the cows.[19] That ruling has been approved by some eminent specialists,[20] but almost certainly is out of line with public opinion.

Frustrating and difficult as is the judicial task of dealing with such tax questions, this appears to be a necessary part of the heavy burden of being a judge. Congress recognized this in its action wiping out the effect of the Supreme Court's opinion in the *Dobson* case.[21] In that elaborate opinion, the Supreme Court had directly discouraged appellate courts from upsetting Tax Court decisions merely because they seemed wrong; the opinion sought to establish a new standard, saying that the Tax Court's decisions must not be reversed unless there was a "clear-cut" mistake of law. Disap-

17. Remmlein, "A Time Study of Certain Tax Controversies", *supra*, Note 3.

18. *Lilly* v. *Commissioner*, 343 U. S. 90 (1952).

19. I. T. 3932, 1948—2 Cum Bull. 7.

20. See Griswold, "Charitable Gifts of Income and the Internal Revenue Code", 65 *Harv. L. Rev.* 84 (1951).

21. *Dobson* v. *Commissioner*, 320 U. S. 489 (1943).

proving this opinion, Congress amended Section 1141 of the Internal Revenue Code in 1949 to provide that the review of Tax Court decisions shall be "in the same manner and to the same extent as decisions of the District Courts in civil actions tried without a jury".[22] This action of Congress is important not merely because Congress, right or wrong, speaks with authority as the only government agency for levying taxes, but also because the action is soundly based in denying to specialists the last judicial say as to tax burdens.

22. 53 Stat. 164 (1939), as amended; 62 Stat. 991 (1948); 26 U.S.C. 1141 (1948).

An Interesting Document from New York Under Dutch Rule

■ A Dutchman renowned as the author of the first literary description of the Dutch colony in what is now New York[1] was also the first to obtain a license to practice law in New Netherland. In 1641, Adriaen van der Donck,[2] an honor graduate of Leyden, the famous university and school of law in Holland, accepted an invitation of the rich and influential patroon, or feudal lord, Kiliaen van Rensselaer, to serve as his *schout-fiscal,* or legal adviser, on his estate. The patroonship settlements in New Netherland, of which Van Rensselaer's was the outstanding one, were part of the feudal system prevailing at that time in Europe and transplanted to the American colonies. Accordingly, the patroonships were not under the direct administration of the Netherlands' West India Company, New Netherland's sovereign, nor under the immediate control of its appointee, the Governor of New Netherland. Rather, they were under the feudal regime of the patroons who had also a certain jurisdiction over their vassals. It is in this connection, that van Rensselaer needed a legal adviser. Van der Donck discharged his duties in an admirable way.

His ambition, however, was to become a patroon himself, and the opportunity was soon given to him. In recognition of his diplomatic skill, displayed in the successful negotiation of a peace treaty with the Mohawk Indians, he received a patroonship patent or charter of which he made use by establishing a plantation, under his feudal control, originally named *Colondonck* or Donck's colony. Its site was identical with that of the present town Yonkers in the State of New York. Honoring him by the Dutch title "Yonkheer", his people would know his estate as "De Yonkheer's Lant", and this came to be simplified into Yonkers.

Van der Donck reached the climax of his career when he became the leader of a democratic move against the dictatorship of Governor Stuyvesant. On behalf of the so-called popular party in New Netherland, he drafted the famous "Remonstrance of New Netherlands", one of the intellectual precursors of our Declaration of Independence. It was a forceful petition for a bill of rights, addressed to the directors of the West India Company in Amsterdam. Apparently its salutary impact upon the political climate in New Netherland was far from negligible.

Near the end of his eventful life, Van der Donck applied in Amsterdam for a license to practice law in New Netherland. His request was granted only with an interesting qualification, as appears from a letter, dated July 24, 1653, addressed to Stuyvesant by the directors of the West India Company in Amsterdam. Translated, it reads in part:

> Whereas, Master Adriaen van der Donck has presented to our Board of Directors two petitions, namely that having received his degree at law by the University of Leyden and having been admitted to the Bar by the Court of Holland, he may be permitted to practice as an Attorney and Counsellor at Law in New Netherland, and that he also be permitted to examine documents and other material in the Secretary's Office in New Amsterdam, for the purpose of completing his Description of New Netherland,
>
> RESOLVED: On the first petition, we allow him to practice law in New Netherland as a legal adviser of clients anxious to get his advice. *We do not feel, however, that it would be proper,* at the present time, *to allow him to represent a party by pleading in court, since we do not know of anybody in New Netherland of sufficient ability and learning . . . to adequately counter him in pleading for his client's opponent.* [Italics supplied].

It would seem that this document considers equal opportunity of representation by learned counsel as inherent in the ideal of justice. Apart from any experiments of socialization of our profession, not much attention has been paid to this particular aspect in the practical administration of justice. By procuring the assistance of outstanding counsel, a party may gain a substantial advantage in the promotion of a cause over an opponent who is handicapped by financial inability to afford first-class representation. However, in excluding, to a certain extent, the possibility of representation by learned counsel, from small claims courts, modern legislators have been guided by the above-mentioned ideal. A California district court of appeal, in commenting on such a statute, had this to say:

> If one of the litigants in such a court could employ counsel, it would of necessity mean that the poor untrained litigant who could not afford to pay such costs would be at a disadvantage. That is the theory upon which our Legislature, acting well within its powers to determine within constitutional limits the social and economic policies of the state, determined by the adoption of section 117g of the Code of Civil Procedure that lawyers should be excluded at the first trial of such cases.[3]

MAXIMILIAN KOESSLER
San Francisco, California

1. Adriaen van der Donck, *Description of New Netherland,* printed by Nieuwenhof, the well-known publishing concern in The Hague, Holland.

2. For a short biographical sketch see: Koessler, "A People's Champion in New Netherland", 4 *Knickerbocker Weekly* (New York) 18.

3. *Prudential Insurance Co. v. Small Claims Court,* 76 C.A. 2d 379, 173 P. 2d 38 (1946).

77th Annual Meeting:

Summary of Program

■ The lawyers who gather in Chicago for the 77th Annual Meeting of the Association next month will take part in one of the largest and most interesting meetings ever held for the legal profession. The highlight of the meeting will be Thursday, August 19, when Chief Justice Earl Warren and past President Robert G. Storey will speak at the ceremonies dedicating the new American Bar Center. That evening, at the Annual Dinner, Sir David Maxwell Fyfe, Q. C., M. P., Her Majesty's Secretary of State for Home Affairs, will be the principal speaker.

The meeting will officially open on Monday, August 16, at 10:00 A.M. in the Grand Ballroom of the Conrad Hilton Hotel. This will be the first of five sessions of the Assembly of the American Bar Association, the other sessions being held on Wednesday, at 2:00 P.M., Thursday at 2:30 P.M. and Friday morning at the conclusion of the meeting. The Thursday afternoon session will be held in Rockefeller Memorial Chapel on the campus of the University of Chicago, for the dedication of the American Bar Center. The highlight of the Wednesday session of the Assembly will be the address of John A. MacAulay, Q. C., President of the Canadian Bar Association.

The House of Delegates will meet in the Gold Room of the Congress Hotel at 2:00 P.M. Monday, August 16; 9:30 A.M. Tuesday, August 17; 9:30 A.M. Wednesday, August 18; 9:30 A.M. Thursday, August 19; and 9:30 A.M. Friday, August 20.

The seventeen Sections of the American Bar Association will all have special programs during the meeting. It is impossible to give all the details of these meetings here, and only a few of the events are mentioned.

The Section of Administrative Law will hold its meetings at the Blackstone. There will be a special program on the question, "Do Administrative Proceedings Endanger the Public?" on Monday, with general sessions following on Tuesday.

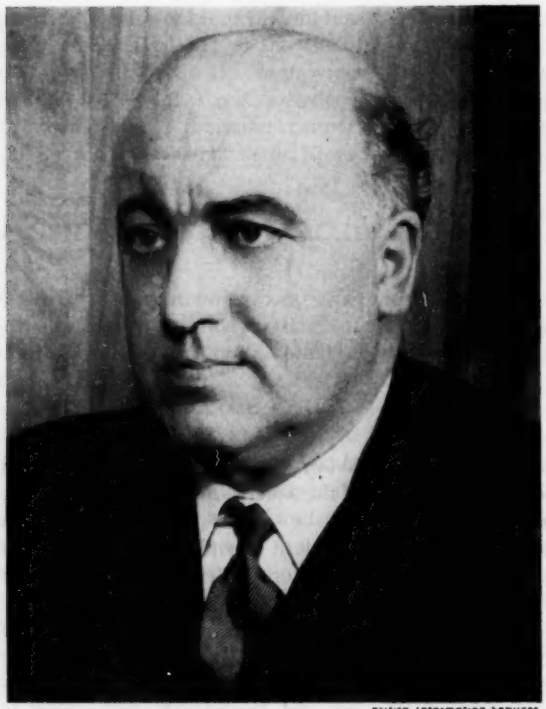
The Section of Antitrust Law will meet at the Blackstone Hotel. General sessions are scheduled for Wednesday, August 18, and Thursday, August 19. The Wednesday session will include a symposium on "The Defense of an Antitrust Proceeding", while "The Remedies in an Antitrust Proceeding" will be the subject of a symposium on Thursday. There will be a luncheon session on Thursday at which Chairman Edward F. Howrey, of the Federal Trade Commission, Stanley N. Barnes, Assistant Attorney General in Charge of the Antitrust Division, and S. Chesterfield Oppenheim, Co-Chairman of the Attorney General's National Committee To Study the Antitrust Laws, will speak on the subject "Current Developments in the Field of Trade Regulations".

The Section of Bar Activities, meeting at the Conrad Hilton, will hold general sessions on Tuesday and Wednesday. Judge Otis R. Hess, of Cincinnati, Ohio, Luther M. Bang, of Austin, Minnesota, and Leo E. Brown, Director of Public Relations of the American Medical Association, will be speakers on such subjects as "Modern Trend in Expert Medical Testimony", "How To Make Your Law Practice Pay" and "Public Relations Between the Bar and Lay Groups".

The Section of Corporation, Banking and Business Law, meeting at the Palmer House, has planned an extensive program of discussion and panel sessions. On August 16 there will be an informal dinner at the University Club, which will feature an off-the-record discussion of major food-and-drug-law problems.

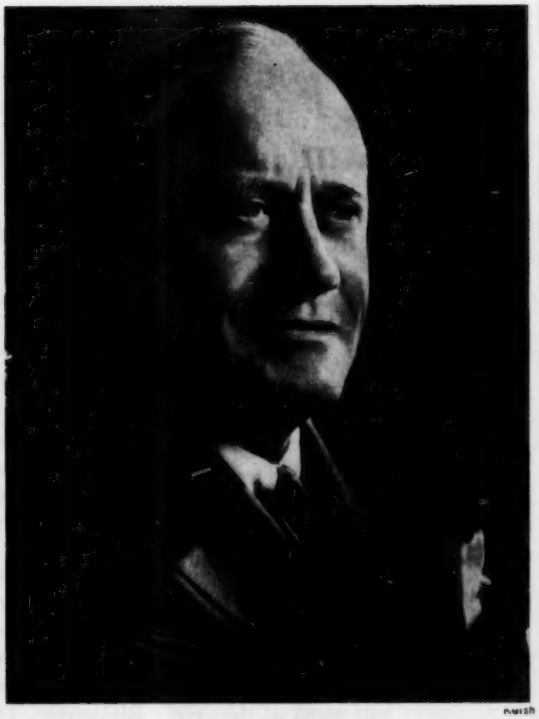
From Monday to Wednesday, the Section of Criminal Law will hold meetings at the Blackstone. Professor Arthur H. Sherry, of the University of California School of Law, Executive Director of the American Bar Association's Committee on Administration of Criminal Justice, will make a "Progress Report on Criminal Law Research", while Professor Herbert Wechsler, of Columbia, will discuss the American Law Institute's Model Penal Code. A "Workshop Session on Trial Techniques Involving Mental Competency" on Wednesday will include Judge Charles L. Dougherty, Francis X. Busch and Charles A. Bellows, all of Chicago, as participants.

The Section of International and Comparative Law, which will hold its meetings at the Conrad Hilton, has scheduled for discussion such topics as "Foreign Law Problems in California" and "United Nations



British Information Services

Sir David Maxwell Fyfe, Q.C., M.P.
Her Majesty's Secretary of State for Home Affairs



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John A. MacAulay, Q.C.
President, Canadian Bar Association

Charter Review". Sir David Maxwell Fyfe will address the annual joint luncheon with the Junior Bar Conference.

The activities of the Section of Judicial Administration, most of which are scheduled for the Blackstone, include the luncheon for federal judges on Monday, and the Annual Dinner in honor of the Judiciary of the United States on Monday evening at the Conrad Hilton. Judge Florence E. Allen, of the United States Court of Appeals for the Sixth Circuit, and Edward R. Murrow, well-known news commentator, will be among the numerous speakers at sessions of this Section.

The Junior Bar Conference will hold its traditional supper dance at the Ambassador East on Tuesday, which will be the climax of the younger lawyers' sessions. Business and luncheon sessions will be at the LaSalle Hotel in the Loop, and will include a joint luncheon with the Section of International and Comparative Law.

The Section of Labor Relations Law, meeting at the Conrad Hilton, from Sunday through Tuesday, will hear reports on recent trends in labor law. Arthur Larson, Under Secretary of Labor, will address a luncheon of the Section on Tuesday. His topic will be "The Lawyer and Social Legislation".

The sessions of the Section of Legal Education and Admissions to the Bar will be conducted jointly with the meeting of the National Conference of Bar Examiners from Saturday to Tuesday. Among the speakers at various sessions will be Homer D. Crotty, of California, Professor John H. Fox, Jr., of the University of Mississippi Law School, Charles P. Taft, of Cincinnati, Ohio, and the Very Reverend James A. Pike, Dean of the Cathedral of St. John the Divine, in New York City.

The Section of Mineral Law will hold general sessions on Monday, Tuesday and Wednesday at the Conrad Hilton. Charles P. Henderson, member of the United States Commission on Intergovernmental Relations, will address a luncheon meeting on Monday, and one of the most interesting subjects for discussion will be "Present and Future Aspects of Atomic Energy and the Legal Problems Which It Poses".

Patent Commissioner Robert C. Watson will be the principal speaker at a general session of the Section of Patent, Trade-Mark and Copyright Law on Tuesday, August 17, at the Sheraton Hotel. The sessions of the Section will begin on Friday, August 13.

The Section of Public Utility Law will hold its meetings in the Blackstone. There will be a panel discussion of developments in that field of law during the year on Monday, while on Tuesday and Wednesday there will be sessions on "Current Problems in the Regulation of the Transportation Industries", "The Modern Approach to the Preparation and Trial of a Public Utility Rate Case" and "The Impact of the Hoover Commission on the Independence of Federal Regulatory Agencies".

The Section of Real Property, Probate and Trust Law will hold its meetings at the Congress Hotel on

Monday, Tuesday and Wednesday. The Probate and Trust Law Divisions will hear panel discussions on "The Impact of the New Revenue Bill on Trusts and Estates" and "Income Tax Problems Affecting Estates and Trusts". The Real Property Division's speakers will take up such questions as "Elimination of Stale Restrictions on Use of Land", "Is the Requirement of Marketable Title Outmoded?" and "Legal Problems Involved in Open-End Mortgages."

The Council of the Section of Taxation will hold business meetings on Thursday and Friday, August 12 and 13, while the general sessions of the Section will begin Saturday, August 14. There will be a reception, dinner and dance on Tuesday, August 17, at the Blackstone. Most of the business sessions will be held at the Congress Hotel.

Among the affiliated organizations holding meetings during the time of the American Bar Association meeting will be the American Judicature Society, which will hold a luncheon on Thursday, August 19, in the Conrad Hilton, the American Law Student Association, which will meet from Saturday, August 14, through Thursday, August 19, and the Judge Advocates Association, meeting on Tuesday and Wednesday, August 17 and 18. The National Conference of Commissioners on Uniform State Laws will meet from August 9 to August 14 at the Conrad Hilton; the National Conference of Bar Presidents will meet at the Conrad Hilton on Saturday and Sunday, August 14 and 15. There will be numerous meetings of law school alumni associations and legal fraternities.

A complete schedule of meetings will appear in the Advance Program, which will be mailed to all members of the Association around the middle of July.

ENTERTAINMENT

■ The Committee for American Bar Association 1954 Annual Meeting, appointed jointly by The Chicago Bar Association and the Illinois State Bar Association, has made preliminary announcement of the following entertainment program:

Sunday, August 15

(See Schedule of Religious Services below)

7:30 P.M. (Sharp)—Open-Air symphony concert — Grant Park

Monday, August 16

2:00-4:00 P.M. Lecture, tour of art exhibits and tea for ladies — Chicago Art Institute

7:30 P.M. The Chicago Bar Association gridiron show "Fieri Faces" (Second show at 9:30 P.M.) — Terrace Casino Morrison Hotel

9:30-12:00 P.M. American Bar Association President's Reception with dancing and refreshments. — Palmer House

Tuesday, August 17

12:00 M. Luncheon and fashion show for ladies. (Buses leave The Conrad Hilton Hotel 11:30 A.M.) — Edgewater Beach Hotel

7:30 P.M. The Chicago Bar Association gridiron show "Fieri Faces" (Second show at 9:30 P.M.) — Terrace Casino Morrison Hotel

Wednesday, August 18

3:30 P.M. Reception for ladies, following an address by Hon. Ivy Baker Priest, Treasurer of the United States — Sheraton Hotel

Thursday, August 19

2:30 P.M. Dedication of American Bar Center (Buses leave The Conrad Hilton Hotel 1:30 P.M.) — Rockefeller Chapel

Tickets for the above listed events and other entertainment will be available at the Local Information Desk maintained by the Committee in the Headquarters in the South Ballroom on the third floor of The Conrad Hilton Hotel. Application for these tickets should be made promptly after registering at American Bar Association Headquarters. A moderate charge will be made for tickets for some of the events. Since some events may be over-subscribed, tickets must be on a first-come-first-served basis.

A hospitality suite for the ladies will be maintained throughout the meeting by wives of Illinois Lawyers at Room 14 on the fourth floor in The Conrad Hilton Hotel.

COMMITTEE FOR AMERICAN BAR ASSOCIATION 1954 ANNUAL MEETING

Richard Bentley, Karl C. Williams — *Co-Chairmen*

David J. A. Hayes, — *Secretary*

Tappan Gregory
Harry G. Hershenson
Stephen E. Hurley
Albert E. Jenner, Jr.
Harold L. Reeve
Benjamin Wham

Religious Services

So that visiting members and their families may conveniently fulfill their customary religious observances, through the courtesy of the various religious leaders the following services are announced:

BAPTIST

(Sunday, August 15)

Second Baptist, 1857 West Jackson Boulevard; L. E. Olson, D. D.; Sunday, August 15 at 10:45 A.M.

North Shore Baptist, 5244 North Lakewood Avenue; August M. Hintz, D. D.; Sunday, August 15 at 11:00 A.M.

CONGREGATIONAL

(Sunday, August 15)

First Congregational, 1613 Washington Boulevard (at Ashland Avenue); Dr. George Ogden Kirk; Sunday, August 15 at 11:00 A.M.

EPISCOPALIAN

(Sunday, August 15)

St. Chrysostom's, 1424 North Dearborn Street; Rt. Rev. Gerald Francis Burrill, Bishop of the Diocese of Chicago; Sunday, August 15 at 11:00 A.M.

GENERAL

(Sunday, August 15)

World Council of Churches, Soldier Field, Grant Park, (world-renowned speakers, pageantry); Sunday, August 15 at 7:30 P.M.

JEWISH

(Saturday, August 14; Monday-Friday, August 16-20)

Temple Isaiah Israel, 1100 East Hyde Park Boulevard; Rabbi Jacob J. Weinstein; Saturday, August 14 at 10:30 A.M.

Chicago Loop Orthodox Synagogue, 16 South Clark Street; Rabbi Elias Gamze; Saturday, August 14 at 8:05 A.M.; 6:00 P.M.; Sunday, August 15 at 9:30 A.M.; 6:00 P.M. Monday-Friday, August 16-20 at 8:05 A.M.; 5:15 P.M.

LUTHERAN

(Sunday, August 15)

First St. Paul's Lutheran (Missouri Synod), 1301 North LaSalle Street; Dr. James G. Manz; Sunday, August 15 at 9:00 A.M.; 11:00 A.M.

Wicker Park Lutheran (National Lutheran Council), North Hoyne Avenue and LeMoyne Street; The Rev. Malcolm Shutters, Sunday, August 15, at 11:00 A.M.

METHODIST

(Sunday, August 15)

Chicago Temple, 77 West Washington Street; Dr. Charles R. Goff; Sunday, August 15 at 11:00 A.M.

PRESBYTERIAN

(Sunday, August 15)

Fourth Presbyterian, Delaware Place, 900 North Michigan Avenue; Dr. Harrison Ray Anderson; Sunday, August 15 at 11:00 A.M.; 4:00 P.M.; 8:00 P.M.

Second Presbyterian, 20th Street and Michigan Avenue; Dr. Louis W. Sherwin; Sunday, August 15 at 11:00 A.M.

ROMAN CATHOLIC

(Sunday, August 15)

Holy Name Cathedral, North State Street at Chicago Avenue; His Eminence, Samuel Cardinal Stritch, Archbishop of Chicago; Sunday, August 15, at 10:00 A.M., Red Mass (followed by breakfast at The Conrad Hilton Hotel) Ceremonial procession Wabash and Superior Streets at 9:15-9:30 A.M.

Old St. Mary's (Paulist Fathers), Around corner from The Conrad Hilton Hotel; Rev. Frank R. McNab, C.S.P., Sunday, August 15, at 8:00 A.M. and every hour 6:00 A.M. to 12:00 M.

St. Peter's (Franciscan Fathers), 110 West Madison Street; Rev. Terrence Thomas, O.F.M., Sunday, August 15, every hour 5:00 A.M. to 12:00 M.

NOTICE OF ANNUAL MEETING OF MEMBERS OF AMERICAN BAR ASSOCIATION ENDOWMENT

■ The annual meeting of members of the American Bar Association Endowment will be held during the week of the Annual Meeting of the American Bar Association, August 16-20, 1954, at the Conrad Hilton Hotel, Chicago, Illinois, for the election of two members of the Board of Directors for the term of five (5) years and for the transaction of such other business as may come before the meeting.

All members of the American Bar Association are members of the Endowment.

Proposed Amendments to the Constitution of the American Bar Association

To Be Presented to and Acted upon at Its Seventy-Seventh Annual Meeting at Chicago, Illinois, August 16-20, 1954

■ *To the members of the American Bar Association and of the House of Delegates:*

Notice is hereby given that John D. Randall of Cedar Rapids, Iowa; Stuart B. Campbell of Wytheville, Virginia; John C. Satterfield, of Jackson, Mississippi; Sylvester C. Smith of Newark, New Jersey, and Loyd Wright of Los Angeles, California, members of the Association, and members of the Committee on Rules and Calendar of the House of Delegates, have filed with the Secretary of the Association the following amendments to the Constitution of the Association:

(a) Amend Article IV, Section 3 by inserting in line 9, after the word "shall" the words "resign or"; by deleting from line 11 the word "deemed" and inserting in lieu thereof the word "declared"; and by deleting from line 11 the word "thereupon"; so that the final sentence of this section will read as follows:

> If an Assembly Delegate shall *resign or* fail to register in attendance by twelve o'clock noon on the opening day of an annual meeting, the office of such delegate shall be *declared* to be vacant; and the Assembly shall elect a successor to serve for the remainder of the term.

(b) Amend Article VIII, Section 4 by inserting in line 1 thereof, before the words "Director of Activities" the words "Executive Director" and by deleting from line 1 the words "Executive Secretary"; by inserting in line 3 thereof, before the words "a Director" the words "an Executive Director"; by deleting from line 4 thereof the words "an Executive Secretary"; by inserting in line 6 thereof before the word "Director" the words "Executive Director and the" by substituting in line 7 thereof for the words "a member" the word "members"; and by deleting the final sentence of the section; so that, as amended, Section 4 will read:

> SECTION 4. *Executive Director, Director of Activities, Assistant Secretaries, Assistant Treasurers.* The Board of Governors may elect, and may prescribe the duties of, *an Executive Director,* a Director of Activities, one or more Assistant Secretaries and one or more Assistant Treasurers, each of whom shall hold office at the pleasure of the Board of Governors. The *Executive Director and the* Director of Activities shall be *members* of the Association.

(c) Amend Article IX, Section 1 by substituting in line 2 thereof for the word "seventy" the words "one hundred and twenty"; by substituting in line 37 thereof for the words "one hundred" the words "one hundred and twenty"; by inserting in line 43 thereof after the word "mail" the word "promptly"; and by deleting in lines 46, 47 and 48 the sentence, "Said date shall not be later than eighty days before the date fixed for the opening of said annual meeting of the Association" so that the amended portions of this section will read as follows:

> SECTION 1. *Nominations by State Delegates.* The State Delegates from each State shall meet, not later than *one hundred and twenty* days before the opening of the annual meeting in each year, and shall make, and promptly announce and publish, a nomination for each of the offices of President, Secretary, and Treasurer, and for the members of the Board of Governors to be elected in that year. In even-numbered years, they shall nominate a Chairman of the House of Delegates. . . .
>
> If, not earlier than one hundred and fifty days and not later than *one hundred and twenty* days before the date fixed for the opening of the annual meeting of the Assocation in any year, the Board of Governors shall recommend that the nominating meeting of the State Delegates be not held in that year because the state of the Nation or the financial condition of the Association makes the holding of such meeting inadvisable, the Secretary shall prepare and mail promptly to each State Delegate an appropriate ballot for voting upon the question whether said meeting shall be held, with the request that such ballot, duly marked, be mailed to the Secretary on a date to be fixed by him. On the date fixed for the return of such ballots the Secretary shall count the same and shall certify the result to the Chairman of the House of Delegates. . .

(d) Amend Article IX, Section 2 by substituting for the word "seventy" in lines 1, 9 and 14 thereof, the words "one hundred and twenty" in each case; and by substituting for the word "forty" in lines 2, 9 and 15 thereof the word "seventy" in each case, so that the amended portion of this section will read as follows:

> SECTION 2. *Other Nominations.* Not earlier than *one hundred and twenty* days nor later than *seventy* days before the opening of the annual meeting, one hundred members of the Association in good standing, of whom not more than fifty may be accredited to any one State, may file with the Secretary a nominating petition (which may be in parts) duly signed, making other nominations for the office of President, Secretary or Treasurer, and in even-numbered years, for Chairman of the House of Delegates. Not earlier than *one hundred and twenty* days nor later than *seventy* days before the opening of the annual meeting in even-numbered years, fifteen members of the House of Delegates may file with the Secretary a nominating petition (which may be in parts) duly signed, making other nominations for the office of Chairman of the House of Delegates. Not earlier than *one hundred and twenty* days nor later than *seventy* days before the opening of the annual meeting, fifty members of the Association in good standing, of whom not more than twenty-five may be accredited to one State, may file with the Secretary a nominating petition (which may be in parts) duly signed, making other nominations for any member of the Board of Governors to be elected in that year. With any nominating petition shall be filed the consent of the nominee. . . .

JOSEPH D. STECHER, *Secretary*

Whitney R. Harris To Be Executive Director

■ At the meeting of the Board of Governors of the American Bar Association on May 18, Whitney R. Harris, of Dallas, Texas, was appointed to head the administrative staff of the American Bar Association effective next October 1. Under an amendment to the Constitution of the Association which will be submitted at the Annual Meeting in August his title will be Executive Director.

The Board of Governors is very pleased to announce Mr. Harris' acceptance of this appointment. By reason of his varied experience as a practicing lawyer, law school teacher, administrator and leader in bar association work, he is eminently qualified to assume the responsibilities of this important position. The Association is fortunate to obtain his services.

WHITNEY R. HARRIS

Whitney Harris was born in Seattle, Washington, in 1912. He is a member of the California and Texas State Bar Associations. He received his B.A. degree at the University of Washington in 1933, graduating *magna cum laude* and a member of Phi Beta Kappa. His LL.B. degree was obtained at the University of California in 1936 where he was elected to the Order of the Coif. He began the practice of law in 1936 in Los Angeles. He was elected chairman of the Junior Barristers of Los Angeles and served as a member of the Board of Trustees of the Los Angeles Bar Association in 1941. He was a member of the Council of the Junior Bar Conference in 1941.

Mr. Harris entered the Navy in March, 1942, and served until 1946, rising from ensign to lieutenant commander. He received the Legion of Merit. In the summer of 1945, while serving on detached duty with the Office of Strategic Services, he was transferred to the staff of Mr. Justice Robert H. Jackson, United States Chief of Counsel at Nuremberg, and served as trial counsel on his staff until the completion of the trial in October, 1946. He then served as Chief of the Legal Advice Branch, Legal Division, United States Military Government in Berlin until May, 1948, when he went to Southern Methodist University School of Law, where he has since been engaged as professor of law, Director of the Law Institute of the Americas and in the work of the Southwestern Legal Foundation.

Mr. Harris belongs to the Methodist Church. He is a member of the Kiwanis Club and Vice President of the Dallas Club. He has been a member of the American Bar Association since 1937. For three years he has served as a member of the Council of the Administrative Law Section of the Association and is the

present Chairman of the Section of International and Comparative Law. He is a member of the Council and Assistant Secretary General of the Inter-American Bar Association. Mr. Harris is now serving as Staff Director of the Legal Services and Procedure Task Force of the Hoover Commission. He is the author of many articles in legal periodicals and of a casebook on family law.

"Mr. Justice Jackson said last year that in the American Bar Center we were building a cathedral to the law", said Mr. Harris. "It is a privilege to be one of those who will help from the beginning to make the American Bar Center fully worthy of that high resolve."

The Biography of a Lawsuit: The Cost of Justice

by **Harry D. Nims** • of the New York Bar (New York City)

▪ This was not an unusually difficult lawsuit. From all that appears, it was an ordinary action by two partners of a dissolved partnership against the third. Mr. Nims sets down the history of the case step by step without discussing the merits. The moral lies in the cost, both in time and money, and as to that, the reader is left to draw his own conclusions.

▪ The action described below was brought by two of three partners of a dissolved partnership against the third to recover $11,806.55.

Eight years and eleven months after the case was begun, it was tried and final judgment was entered against the defendant for the full amount claimed in the complaint, with interest. There was no appeal from the final judgment. During four years of this time the defendant was in the Armed Forces so that, in reality, the case was pending about five years.

Generally speaking, cases like this reach trial in less than five years. But some do not. Most of them do not involve as many interlocutory proceedings, or measures instituted for delay and the like, as were used here, but a goodly number do and in some, many more such measures are used than were employed in this instance.

This case is used because it seems to illustrate rather vividly the possible results when a court does not acquaint itself with the use of its facilities which the parties to a litigation make or attempt to make.

Every court has an inherent right to do this, and often it can prevent measures which are instituted for purposes of delay or to embarrass an opponent.

November 28, 1939. This action was begun by service of a summons and complaint. At this time the docket of the court was about eighteen months in arrears.

January 22, 1940. Defendant served an answer.

July 2, 1940. Plaintiffs amended their complaint.

August 8, 1940. Defendant served an amended answer and a counterclaim.

October 23, 1940. Plaintiffs served a reply and the case was put on the docket for trial.

January 14, 1942. Defendant changed his attorneys.

February 21, 1942. Defendant made a motion, which was granted, to require an undertaking by plaintiffs for costs.

March 6, 1942. Plaintiffs made a motion for discovery and inspection of documents. This motion was granted in a long opinion and a retired judge of the court was appointed to supervise the discovery procedure.

March 25, 1942. Plaintiffs served and filed a bill of particulars and later a further bill of particulars and admitted certain facts, as requested by the defendant.

March 25, 1942. Defendant again substituted attorneys.

April 8, 1942. The case was reached for trial, two and a half years after it was begun. Defendant asked for an adjournment. Plaintiffs opposed, but the defendant's application was granted. At the same time defendant moved also for inspection and discovery. This, also, was granted.

April 14, 1942. Plaintiffs served a demand for a further bill of particulars and defendant moved for a commission to take depositions in Texas.

April 22, 1942. The court granted defendant's motion for a commission provided defendant paid a counsel fee of $1,250 to the plaintiffs, for attending the taking of such depositions.

April 24, 1942. Defendant filed a notice of appeal from so much of the order as required him to pay a counsel fee of $1,250. This appeal was later briefed and argued.

April 28, 1942. Defendant moved

for judgment on the pleadings.This was denied with an opinion of some length.

May 5, 1942. Defendant filed admissions of fact as requested by the plaintiffs.

May 7, 1942. The Appellate Court modified the order requiring the defendant to furnish $1,250 counsel fees reducing such fees to $500.

During May, 1942, the Texas depositions were taken. How many hearings were involved the record does not disclose.

May 11, 1942. Plaintiffs amended their admissions of fact previously made and filed them.

May 19, 1942. Both sides stipulated that the case be put at the top of the docket for trial and the court so ordered.

May 28, 1942. Defendant filed a notice of appeal from the order of April 28, 1942, denying defendant's motion for judgment on the pleadings and served notice of examinations before trial of the two plaintiffs The record does not disclose whether or not this examination was held. The appeal was not perfected.

June 15, 1942. The referee, who had been appointed to supervise the discovery and inspection of plaintiff's documents, filed his report.

June 18, 1942. Defendant applied for adjournment of the trial. Plaintiffs opposed. The trial was adjourned.

October 21, 1942. Defendant volunteered his services and entered the Army, and the court ordered a military stay of proceedings.

September 24, 1946. Plaintiffs moved to vacate the military stay of the proceedings. The court ordered the case back on the docket. This was six years and eleven months after the suit was begun.

January 28, 1947. Both sides consented to adjournment of the trial.

February 26, 1947. Both sides consented to a further adjournment of the trial.

March 25, 1947. Both sides consented to adjournment of the trial.

April 1, 1947. Plaintiffs made a motion for summary judgment which was adjourned by stipulation. Defendant made a cross motion for summary judgment.

April 30, 1947. Both these motions were adjourned by stipulation.

May 1, 1947. Both sides stipulated another adjournment of the trial.

May 27, 1947. Plaintiffs' motion for summary judgment and defendant's cross motion for summary judgment were heard and both were denied.

July 27, 1947. Both parties appealed from the denial of their motion for summary judgment. (These appeals were decided seven months later.)

October 3, 1947. Both parties consented to another adjournment of the trial and the court so ordered.

December 11, 1947. Trial adjourned by stipulation. The court so ordered.

February 2, 1948. Trial adjourned by stipulation. The court so ordered.

February 20, 1948. The Appellate Court affirmed the denial of the motions of both parties for summary judgment.

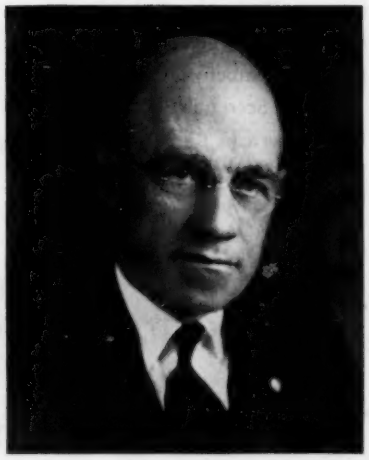
About this time defendant's counsel moved for an order relieving them from further representation of the defendant on the ground that in good conscience they could not continue to make further efforts to delay the action and postpone the trial as he requested them to do. At the time counsel made this application, the defendant, himself, pleaded with the court for further postponements. Presently new counsel for defendant applied for adjournments and obtained them and proceeded to institute further interlocutory proceedings.

May 24, 1948. New attorneys for the defendant made a motion for judgment on the pleadings which the court denied.

June 9, 1948. Defendant filed a notice of appeal from the denial of the motion for judgment on the pleadings.

July 22, 1948. Defendant moved to add an additional party plaintiff. This motion was denied.

August 20, 1948. Defendant filed a notice of appeal from the denial of the motion to name a third party plaintiff. This appeal was not perfected.



Harry D. Nims, who practices in New York City, is Chairman of the Pretrial Committee of the Section of Judicial Administration and was a member of the Judicial Council of New York from 1934 to 1949. He is the author of articles and books on legal subjects.

September 29, 1948. Defendant amended his answer. Plaintiffs served a reply.

October 6, 1948. Eight years and eleven months from its beginning, the case went to trial before a jury. The trial occupied seven days.

October 19, 1948. The jury found for the plaintiffs for $11,806.55, the exact amount asked for in the complaint, and the court ordered judgment for the plaintiffs in that amount.

November 9, 1948. Plaintiff moved that the judgment include interest. Granted.

November 15, 1948. Judgment was entered for $11,806.55, plus interest from December 31, 1937, to November 15, 1948, amounting to $7,701.36, plus costs and disbursements of $269.87. TOTAL, $19,777.78.

There was no appeal.

Twelve judges heard and decided procedural motions. One of them wrote a long opinion. A retired judge, who received a substantial salary from the state, supervised the discovery proceedings. One judge

presided at the trial, which occupied seven court days.

An appellate court of five judges heard two appeals from procedural motions. A jury sat for seven days.

The taxpayers pay about $150,000 per year to maintain a judge of this court.

In this case the services of nineteen judges were used (there would have been twenty-four had different judges made up the appellate court on the two appeals).

The charges of counsel are not in the record. Defendant changed counsel three times—in January, 1942, again in March, 1942, again in May, 1948. Reasonable fees of counsel for both parties with their expenses may easily have totaled at least $7,500.

The 1,416 pages of printed matter required for two appeals may have cost from $3,000 to $4,000.

Some 1,900 pages of typewriting were used for affidavits, briefs and the like, the cost of which was absorbed, no doubt, in bills of counsel.

Defendant paid $500 allowance to plaintiffs for attending the Texas depositions.

The Texas depositions filled 887 pages, the taking of which probably involved an expense of at least $1,000.

The court facilities used cost the public a substantial sum.

It seems therefore reasonably accurate to say that the disposition of this case must have cost the public and the parties at least $15,000.

Results of Election for State Delegates

Jurisdiction	Delegate Elected	Ballots Mailed	Ballots Returned	Per cent of return
Arizona	Walter E. Craig, Phoenix (154)	292	171	59
Connecticut	Charles W. Pettengill, Greenwich (303)	788	345	44
District of Columbia	Charles S. Rhyne (731)	2043	777	38
Illinois	Benjamin Wham, Chicago (1777)	3832	2560	67
Iowa	Ingalls Swisher, Iowa City (288)	722	544	75
Maine	Clement F. Robinson, Brunswick (83)	182	112	62
Michigan	Glenn M. Coulter, Detroit (751)	1629	826	50
Mississippi	John C. Satterfield, Jackson (169)	324	176	50
Montana	Julius J. Wuerthner, Great Falls (115)	233	127	55
Nebraska	George H. Turner, Lincoln (291)	533	300	56
New Jersey	Sylvester C. Smith, Jr., Newark (609)	1404	645	46
Oklahoma	Howard T. Tumilty, Oklahoma City (319)	807	552	68
Puerto Rico	F. Ponsa Feliu San Juan (33)	86	37	43
South Carolina	Walton J. McLeod, Jr., Walterboro (120)	263	132	50
South Dakota	Roy E. Willy, Sioux Falls (92)	166	96	58
Texas	James L. Shepherd, Jr., Houston (1127)	2161	1178	55
Washington	Richard S. Munter, Spokane (364)	811	623	77
Wyoming	H. Glenn Kinsley, Sheridan (86)	131	93	71
		16,407	9,294	57%

Lawyer Referral Service in 1954:

Legal Advice for Those with Jobs

by Theodore Voorhees • of the Pennsylvania Bar (Philadelphia)

■ This is the first of two articles on the efforts of the American Bar Association to build a program that will insure the availability of a lawyer and legal advice to every person in the community. In this article, the Chairman of the Standing Committee on Lawyer Referral Service discusses the problem of providing advice for employees in trades and industries. In next month's issue of the *Journal*, he will review the progress that has been made in establishing referral services in the smaller cities and towns.

■ The local counsel for Western Electric Company in a town in eastern Pennsylvania was recently called upon for advice by the personnel department in its local plant. The company had been obliged to come to the assistance of widows and children of several deceased employees and had found that their estates were needlessly complicated by reason of their failure to make wills. Counsel was therefore invited to interview all personnel in the plant and draw up wills for those who might want them.

Lawyers were sent to the plant in shifts. Any man who expressed a desire for a will was questioned with regard to his property and beneficiaries, and counsel then drew up a will to suit his requirements. No use was made of a standard form, and after the will was prepared, counsel went over it in every case with the maker to insure that it accorded with his desires. Five hundred employees —one out of every two—took advantage of the opportunity, and the preparation and execution of the documents took the better part of a month.

Many of the employees held their property jointly with their wives, and in many instances a simple will was prepared for the husband and a parallel one for the wife. A charge of five dollars was paid by the employee for each will, but a few which were more complicated resulted in a higher, though still moderate, fee. The remuneration was scarcely compensatory, but some consideration was given to the fact that the plant provided the stenographic assistance. The job was an ordeal for the law firm and interfered with its normal practice. The corporate client and the employee clients were, of course, appreciative, but the firm incurred a good deal of criticism from fellow members of the Bar. The five-dollar fee was below the scale of the minimum fee bill and some thought, quite erroneously, that the program had been initiated by the lawyers rather than by Western Electric. Some lawyers expressed the reaction that the basis of such an operation was unprofessional.

Is that reaction justified?

The Need for Legal Advice

Doctors are becoming household accessories along with the family car and television set, but "family lawyer" conjures a picture of a country mansion and the reading of a ten-page will. Everyone along the lane has his own doctor, while those who boast their own attorneys are few and far between. The Bar has accepted with too-ready a willingness the explanation that while every man and child has his ache and pain, invasions of civil and property rights occur on a more selective basis.

Granted that a mass relationship between attorneys and the public comparable to that attained by the physicians seems to be presently unattainable, a fair inquiry in almost any locality will reveal a broad and presently unmet need for legal advice on the part of the ordinary man. Whether he be an engineman or a pilot, an insurance salesman or radio repairman, a bank cashier or the owner of a grocery store, he is a part of what is rapidly becoming the greatest property class in the nation. And along with the house, automobile and television set which he is acquiring, he is, whether conscious of them or not, encountering many legal problems which are the in-

cidents of his new status.

Several months ago, a group of employees at the Radio Corporation of America plant in Camden, New Jersey, were questioned to determine whether they were availing themselves of the services of attorneys.[1] Four hundred who answered a questionnaire were equally divided between two groups, clerical employees, who were not organized, and unionized production workers. Their annual earnings ranged between $3500 and $6000.

Forty-nine per cent of them had bought their own houses. Forty-two per cent reported that either they or some member of their immediate families had been involved in an automobile accident. Only one out of eight had made a will. One out of five of the production workers had an attorney, but 63 per cent of them expressed the belief that they could not afford to consult an attorney about their domestic difficulties or any other legal problem.

It is unnecessary to generalize on the basis of a single survey since recent ones in Texas, Iowa and various other parts of the country have brought forth similar answers. It is apparent that among the great middle-income group—those making between $3000 and $10,000—there exists a need for legal service and an ability to pay for it. Very little advice, however, is being made available. Since there are nearly thirty million individuals who pay income taxes within that group, the sum total of their needs is obviously considerable. As it becomes more and more apparent that those needs are not being met, it seems quite likely that some form of a legal advisory program is bound to be brought forward for the benefit of the public.

Nature abhors a vacuum. Four possibilities are developing in this field which can, without exaggeraton, be termed almost virginal.

A Governmental Program

To cite, first, the one which might have been more obvious three or four years ago, the Government may eventually provide free legal clinics or subsidized legal services for those who are of moderate means. Nearly all lawyers will readily agree that there could be no possible justification for such a socialistic program, for the American workingman is making a good wage and can certainly afford to pay a moderate fee for legal advice. There will, it is true, be instances where men with fair earnings encounter adversity and have difficulty in paying even a small fee, but such cases should be exceptional and should be dealt with either by members of the Bar on a charitable basis or by the widely expanding legal aid society. The skilled mechanic who is purchasing a fifteen thousand dollar house can afford to pay an attorney a twenty-five dollar fee and should be urged to seek advice before he parts with his savings.

While, so far at least, relatively little has been brought forward in favor of a try-out in the United States of the British Legal Assistance plan, it is too early for a complacent Bar to conclude that a socialistic experiment is no longer in the picture. On the basis of surveys that have been made by the Bar itself, the advocates of the welfare state may yet present a case for the governmental legal clinic. The possibility will not be put to rest until the organized Bar or someone on its behalf creates an effective legal advice program for the man in the street.

The "Legal Aid Bureau" Set Up by Labor Unions

A second source of such a program is developing within the ranks of organized labor. Fears have been privately expressed by some leaders of industry that a demand for free legal service may become a new fringe benefit to be tossed on the collective bargaining table after medical services and pensions have been firmly inscribed in the annual contract. To date, however, the union's approach has taken a quite different turn.

A number of labor organizations, notably the railroad brotherhoods, have created the so-called "legal aid bureau" to make legal services readily available to their respective memberships. Despite any connotation from their title, these bureaus are anything but charitable and in most instances charge fees in line with those charged by lawyers generally.

Many of the bureaus are mere alter egos for the general counsel of the union. Some arrangement may exist whereby the union will secure free advice in exchange for its services in "forwarding" cases to its counsel. The Philadelphia Bar Association uncovered last year an arrangement under which the committeemen of a brotherhood were never without blank powers of attorney for its Chicago counsel and signed up the injured brakemen for representation in Federal Employer Liability cases before the blood was dry on their contusions and lacerations.

It should not be inferred that all the bureaus run by the unions should be suspect or that all their general counsel have runners. Nevertheless, the tripartite relationship of union-member-lawyer will bear observation in view of the possibilities of unprofessional conduct and overreaching. The Bar is the only likely force to police the situation, yet it is not in a strong position to do so. Criticism of the role of the union will be strongly resented, and it will be pointed out that without union assistance the membership has little means of securing advice.

Until the organized Bar takes active steps to fill the vacuum, its resistance to the efforts of others to do so is not apt to be taken with good grace.

Programs by Employers

Ten years ago not many employers took any marked interest in the legal problems of their employees. There were a few—call them forward-thinking or paternalistic as you like—who actually furnished advice. One large New York manufacturer maintained a staff of seven lawyers who answered its workers' legal questions without charge; another (one of the

1. This survey was made by the American Bar Association's Committee on Lawyer Referral Service through the courtesy of Samuel E. Ewing, general attorney for R.C.A. manufacturing activities.

largest manufacturers in the nation) established a beneficial association which included within its corporate purposes the giving of free legal advice to the company's employees; a third, with many plants throughout the country, has set up a panel of three or four local attorneys in the vicinity of each plant and has encouraged employees to seek their advice, referring them to the members of the panel in rotation.

In 1950, the Survey of the Legal Profession published a report on corporate legal departments which explored, among other things, the extent to which they gave advice to employees.[2] Out of fifty-two who were questioned, six undertook to give employees general legal advice, thirty-five gave advice on a limited basis and eleven refused to give any whatever. When advice was given on a limited basis and further legal assistance was necessary, it was found that almost invariably the employee asked the company attorney for the recommendation of an outside lawyer who would complete the necessary services.

In February, 1953, a group of twenty-two lawyers from the legal departments of various large industries met with representatives of the American Bar Association in New York to discuss methods of securing legal advice for industrial employees.[3] There was general recognition that the solution must rest with the organized Bar and that the lawyer referral plan, when one existed in proximity to an industrial plant, provided the satisfactory answer. Many large cities, however, had not established a referral service.[4] Furthermore, many plants lay in small communities where the lawyers were not easily persuaded of the need of an organized bar service of any kind.

The lawyers representing industry believed that responsibility on their side rested with their personnel managers. If those who handled industrial relations for the employers could be made aware of the need of the employees for legal advice, they would see to it that the advice would be forthcoming. They would be particularly sensitive to the fact that the labor unions were entering the field. On a public relations basis, if the need for legal advice could be proved to exist, there would be little reason for the employer to stand by and allow the union to take credit for having made the services of attorneys available to employees. Therefore, the industry lawyers counseled that the personnel managers be alerted to the problem and educated as to what could be done. Through the kind offices of the American Management Association, a fair start has been made along that line. Many large concerns during the past year have advised their employees to seek legal advice when facing legal problems and in articles in house organs have exhorted them to utilize the services of a lawyer referral plan if there was one in operation in the community.

However, in the last analysis, the Bar cannot rely on laymen or any lay organization to tell the public how to make use of its services. The most experienced and highly placed men in industry often fail to recognize that legal problems are implicit in their day-to-day affairs. Personnel managers are not likely to perceive the existence of problems, not merely because the employees themselves are not conscious of the problems but also because when employees have personal problems they are loath to discuss them at the plant.

Granting all that, however, the Bar has an important ally in the industrial employer and should get strong assistance from him in any program that can be set up for his employees.

The Program of the Organized Bar Is Designed for Middle-Income Class

Most lawyers will agree that providing legal advice to all who need it is the Bar's own problem and that, if the need of many people is not being met, a program should be developed by the organized Bar.

The lawyer referral service is designed for people of moderate means who have no lawyer of their own and can afford to pay a reasonable fee. Without question, it meets the need in the communities where it is established, provided the Bar informs the public of its existence. It has now been adopted in one hundred cities and is spreading rapidly, but lack of adequate publicity has prevented the attainment of its potential usefulness in all but a very few communities. A rather selfish and shortsighted fear on the part of some lawyers that in some way the publicizing of the service may deprive the Bar of its established clientele has blocked its adoption on a number of occasions. The result is that many people who otherwise would become clients of the Bar continue to go through life without representation.

Those who are attorneys for large employers may feel that a publicized referral service constitutes a trespassing within their preserve if a leaflet with regard to the service is distributed among their client's employees. In that case, however, they should be prepared to advocate some other course of action:

A. Would they willingly undertake to draw the wills, handle the domestic problems and attend the settlements of every employee in the establishment, and furthermore would they permit the employer to advise all employees of their willingness to do so?

B. Would they relegate the problem to the representatives of the unions and allow them to make the arrangements for counsel?

C. Would they advise the employer of their own refusal to serve and suggest that he refer his employees to other members of the Bar in any way he sees fit?

D. Would they insist that the employees need no help, that their problems are generally insignificant and that when in real need they

2. Charles S. Maddock, Assistant General Counsel of the Hercules Powder Company, was chairman of the special committee that made the survey, and it was published by the National Industrial Conference Board, Inc., as one of its conference board reports.

3. This meeting was organized by Philip Dechert, General Counsel of the Philco Corporation.

4. At the time of the meeting in February, 1953, there were seventy-four services. Since then, twenty-six new services have been established, and many more are in the offing.

can find advice by some slight effort of their own?

E. And, if the last answer is in the affirmative, are they at heart advocates of the welfare state and do they want the Government to take over the problem?

It is submitted that these solutions are not solutions and that the Bar must broaden its usefulness to the public generally. Employees should be told of the prime importance of consulting a lawyer when they face a legal problem; specifically when they buy a house, make a will, suffer an accident or have domestic difficulties. They must be told that legal advice is within their means, that every member of the Bar stands ready to advise them and that the consequences of failure to secure advice may be serious indeed. The establishment of a referral plan and the informing of the public along the foregoing lines are as important a public service as the organized Bar can perform.

Members of the Board of Governors of the American Bar Association are shown above as they called on President Eisenhower at the White House on May 18 during the meeting of the Board of Governors. Seated: (left to right) Loyd Wright, Los Angeles, President-Nominee of the Association; President Eisenhower; William J. Jameson, Billings, Montana, President of the Association. Standing (left to right): Ross L. Malone, Roswell, New Mexico; P. Warren Green, Wilmington, Delaware; Thomas M. Burgess, Colorado Springs, Colorado; (partially hidden) Herbert G. Nilles, Fargo, North Dakota; LeDoux R. Provosty, Alexandria, Louisiana; (partially hidden) Elwood H. Hettrick, Boston, Massachusetts; Tappan Gregory, Chicago, Illinois; Robert T. Barton, Jr., Richmond, Virginia; Cyril Coleman, Hartford, Connecticut; Donald A. Finkbeiner, Toledo, Ohio; Harold H. Bredell, Indianapolis, Indiana; Richard P. Tinkham, Hammond, Indiana; Joseph D. Stecher, Toledo, Ohio; David F. Maxwell, Philadelphia, Pennsylvania; A. L. Merrill, Pocatello, Idaho; John D. Randall, Cedar Rapids, Iowa; Osmer C. Fitts, Brattleboro, Vermont; Allan H. W. Higgins, Boston, Massachusetts; (partially hidden) Blakey Helm, Louisville, Kentucky; Robert G. Storey, Dallas, Texas, and Joseph D. Calhoun, Media, Pennsylvania.

Whom Are We Protecting?

Some Thoughts on the Fifth Amendment

by Julius J. Hoffman • Judge of the United States District Court for the Northern District of Illinois

■ The Fifth Amendment's guarantee against compulsory self-incrimination has certainly been invoked by some whom we have no desire to protect. In recent months, news of its invocation has appeared so often that some unthinking citizens have gone so far as to call for abolishing the Amendment on the ground that it serves only criminals and Communists. Judge Hoffman declares that, while we must protect both the individual from Star Chamber methods, and the public from traitors, the primary problem is to protect the principles on which our free society is founded.

■ One of the advantages of a political crisis is that it makes people think. One of the disadvantages is that it makes them think they think, which may be worse than not thinking at all. Too many are ruled by their emotions and their emotions are often unruly. In combating the false claim that everyone who is opposed to Senator McCarthy must be in favor of Communism, there have been equally silly claims that everyone who believes that Communists must be removed from positions in the Government is an enemy of civil liberty. It is hard for some people to try to refute the claim that the Army harbors many Communists without being tempted to deny that any Communists ever got into it. Sometimes we are like children playing a game of tag in which the participants grow so excited and run about so wildly that they don't know from whom they are running and have to stop and ask, "Who is It?"

Once in a while, I think, we should stop and ask ourselves that same question: Who is It? Whom are we protecting? What is our real objective? Let us look at the Fifth Amendment without rancor, suspicion or adulation. In the past few years, since the time, say, when the Kefauver Committee became topflight entertainment, one clause of the amendment at least has become as familiar to the public as the letters C.B.S. and N.B.C. Unfortunately, its intent and proper function have been twisted into many fantastic shapes.

In this connection I am reminded of a visit which Frederick the Great is said to have paid to a Prussian prison. Convict after convict proclaimed his innocence and described his incarceration as a great miscarriage of justice. Only one man told a different story. "Your majesty," he said, "I am guilty and deserve to be punished." Frederick turned to the warden. "Free this scoundrel at once", he said. "Put him out of the prison before he corrupts all the noble, innocent inmates."

In the United States, we are now observing the reverse of this technique when, instead of talking themselves into or out of prison, many men resort to silence to hide the facts concerning their guilt or innocence. Even Frederick the Great might be confused, and alert lawyers may find it difficult to distinguish between the lions and the lambs when they lie down together behind the Fifth Amendment. The lions—and by this term I refer to strength, not valor—the lions, who are already mighty in crime, rely on a constitutional right to conceal their probable guilt. Some lambs, who are asked to answer for their thoughts rather than their deeds, choose to let the Fifth Amendment conceal their possible innocence.

The racketeer and gangster have gratefully embraced the privilege against self-incrimination. And why not? Their reticence does not strengthen the presumption of their guilt since that is already firmly established in the public mind. They have great and not unfounded confidence in the connections which have heretofore protected them from criminal prosecution far more ominous than a contempt citation. The situation of a possible saboteur or other agent of a foreign country may be equally simple. If he invokes the Fifth Amendment, he remains technically innocent and actually free

unless or until he is proved guilty. The question, to testify or not to testify, is more perplexing and, incongruously, more sinister in the case of the man who is supected not of any overt act but of secretly harboring unorthodox beliefs.

The fact that membership in an organization on the Attorney General's list is not a criminal offense does not, as we have often seen, lessen the possibility that the revelation of such an affiliation, past or present, may seriously jeopardize a man's job and his status in his community. Insofar as that is the case, he shares with any gangster or saboteur a very practical reason for not wanting to testify. On the other hand, consider the man who invokes the Fifth Amendment as a matter of what he considers principle rather than expediency. It is futile to argue that if he is not a Communist he need not hestitate to submit to questioning. He may refuse to testify not because he has anything to conceal but because he challenges the right of anyone to demand that he reveal his beliefs. The immediate consequences of his action may be the same whether he is a Communist in good standing (with his party, that is) an excomrade, a Democrat or a Republican. If he refuses to testify he takes the risk of leaving the public in doubt about his innocence (in which case he is likely to be judged guilty) and incurs the social and economic penalties which an irate public imposes. But his gesture may also have the effect of giving aid and comfort to those whose motives are less unselfish. By following his lead and indicating that they, too, are interested primarily in upholding a constitutional right, these others file a claim to innocence by association.

In this they often get the support of good and patriotic citizens who are so zealous for civil liberties and so alert to the evils of possible infringement that they are inclined to believe a man innocent not until he is proved guilty but because he has been accused. Conversely, there are other extremists who tend to construe a man's mere summons to appear before an investigating committee as final proof that he is subversive. These groups might cancel each other out if they were mathematical terms, but human equations cannot be solved so neatly. Then the problem is complicated further by the introduction of other elements. Some people who are convinced of the present loyalty of confessed ex-Communists turned informer doubt that other confessed ex-Communists are sincere in their apostasy if they refuse to denounce their erstwhile associates. Many people minimize the Communist threat because they don't like the men or the methods used against it; many others exaggerate the danger because they do not clearly differentiate between criticism of American practices and conspiracy against them.

We Need Not Destroy Liberty To Protect Against Subversion

We have seen plenty of the confusion which results from such a situation. Today few Americans deny that Communism presents a real danger to our country. We need not discuss the number of subversives in government positions. That is a football which is kicked around enough in the game of partisan statistics. But by this time it has become very clear, if there was ever any doubt on this score, that we would not have a free country if, in routing out the Communists, we resorted to totalitarianism and abolished individual rights. Neither would we have a free country if we should allow civil liberties to be fashioned into a mask for conspiracy. But civil liberties and protection against subversion are not two horns of a national dilemma, and our Constitution, which guarantees the first, does not bar the second.

This applies also to criminal law, as lawyers know, and is not restricted to legislative investigations, as the recent hubbub has almost inevitably suggested. We who know the facts should help the public to recognize the relationship between individual rights and the public welfare and not fall into the error of thinking that they are irreconcilable. Historically, of course, ideas of justice have swung back and forth between the two extremes, from complete denial of the rights of the accused to such solicitude for the individual that the interests of the public were at times nearly forgotten.

Blackstone's pronouncement that "It is better that ninety-nine guilty men should escape than that one innocent man should be punished" was the antithesis of the practices of the sixteenth-century Court of the Star Chamber. The safeguards which were written into our Constitution were a logical consequence of the revulsion men felt to earlier European criminal law which required the accused to give evidence against himself, denied him the right to confront his accusers, rewarded informers, accepted secret testimony and resorted to torture to secure confessions. In the latter nineteenth century, an era of great social legislation, Herbert Spencer formulated a philosophy which placed individual liberty ahead of everything, even, for example, to the point of endangering the public health rather than curtailing any man's right to keep his premises as insanitary as he chose.

Today, I hope, we can adhere to a more moderate point of view. Certainly, we should never retreat from the humane and just administration of the law, but neither should we neglect the interest of society as a whole. In our very proper concern for the rights of an individual we must ask ourselves if we are also protecting the rights of the 160,000,000 Americans who are this individual's fellow citizens. A man's right to refuse to give self-incriminating testimony is basic both to our Federal Constitution and the constitutions of all except two of our states; but co-operation with the Government is equally basic in a democracy.

This opinion was forcibly expressed by two noted legal authorities who are also outstanding champions of civil liberties. They are Professors Zechariah Chafee, Jr., and Arthur E. Sutherland, of the Har-

vard Law School, who said in a joint letter to the *Harvard Crimson* that a "witness was neither wise nor legally justified in attempting political protest by standing silent when obligated to speak". The witness, they wrote, is not the ultimate judge of the incriminating character of his testimony. Though he "must not be required to prove his guilt in demonstrating the incriminating character of the answer sought", he can be required, on pain of punishment to show how his answer "will tend, rightly or wrongly, to convict him of a crime".

It should not be forgotten, further, that extreme elasticity is not one of the properties of this privilege. It may not be stretched far enough to permit the witness to avoid giving testimony which is socially embarrassing though not legally damaging. It is also a personal privilege and cannot properly be claimed on the grounds of disgracing or incriminating another person. Even with these limitations, the privilege may smooth the path of the transgressor and increase the task of the law enforcement agencies. That is a price which we pay for our civil liberties. It is a high price but not as high as the cost of abandoning ethical principles.

This is a truism which, unfortunately, has been partially obscured by an intellectual smog compounded of apprehension, exaggeration and misunderstanding, epitomized, perhaps, in the obnoxious term "Fifth Amendment Communist". The false assumption that claiming privilege is proof of Communist leaning has resulted in much of the confusion which has disturbed us. For example, there have been such things as the letter which was published in the *Chicago Daily News* during the winter, printed over the signature of a reader who advocated the repeal of the Fifth Amendment because, in his words, it "clearly serves no good purpose as far as innocent, law-abiding citizens are concerned but is being used exclusively as a cloak for the protection of an endless procession of Communists, spies and traitors".

Such a letter is almost as disturbing as the alleged activities of the persons whom the writer calls "these ungrateful beasts [who] reveal . . . secret information to their paymasters in Soviet Russia". It is disturbing, I think, because it suggests that the Communists have inspired fear and indoctrinated the letter writer with totalitarian views more successfully than we have educated him to American principles. Perhaps he had not read the Fifth Amendment and did not know that it guarantees not only freedom from compulsory self-incrimination but also four other rights of inestimable worth. The notion that spies multiply like disease germs and are as hard to eradicate indicates ignorance of the facts of subversive life and of the effectiveness of our law enforcement agencies. And even if we were in imminent danger we could find some better defense than the abandonment of our rights. To give them up in order to make it easier to catch those who threaten them would be like robbing a man of his valuables today in order to prevent a possible thief from stealing them at a later time. Such an absurdity should remind us that we must not take our Constitution for granted but that in our schools, our courts, our forums and our homes we must continue to sell a bill of rights.

But if we do not want to repeal the Fifth Amendment neither do we want to see it abused. This is not a new idea which was generated only by the recent congressional investigations. Legal authorities have long wrestled with the problem of preserving the safeguard against self-incrimination and at the same time preventing criminals and subversives from using it improperly. If the privilege is withdrawn a prosecutor may rely too greatly on evidence which he can wring from the accused. Rather than make an effort to obtain it from other sources, he may bully the accused and try not so much to get an answer as to get the answer he wants. If we retain the privilege, we offer a possible avenue of escape for the guilty. Wigmore said: "We are to respect it [the privilege] rationally for its merits, not worship it blindly as a fetish. We are not merely to emphasize its benefits, but also to concede its shortcomings and guard against its abuses. . . . The judicial practice . . . of treating with warm and fostering respect any appeal to this privilege and of feigning each guilty invocator to be an unsullied victim hounded by the persecutions of a tyrant is a mark of traditional sentimentality.

Proposals to alter this situation are not new. Indeed, the idea of compelling a witness to testify by granting him immunity from criminal prosecution dates back at least two hundred years. Many immunity statutes have proved to be useful although some confusion has resulted from duplication and differences in phraseology. Wigmore advocated the grant of immunity in all crimes by a single statutory section as was done successfully in Canada. He suggested that "such a measure should leave it to the judge's discretion, in each

Julius J. Hoffman's career includes the general practice of the law, service as a vice president and general counsel for one of the country's largest businesses and teaching on the faculty of the Law School of Northwestern University. In 1947, he was elected judge of the Superior Court of Cook County (Chicago) where he served until appointed to the federal Bench in 1953.

instance, to determine whether the immunity should be granted".

Immunity Statutes Meet Opposition

Proposed legislation to authorize congressional committees to grant immunity is today generally associated with Senator McCarran although a similar measure, suggested by Attorney General McGrath, was introduced by Senator O'Conor, of Maryland, and supported by the Kefauver investigating committee. After this bill failed, Senator McCarran proposed the granting of immunity to any witness by a majority vote of either house of Congress or a two-thirds vote of a congressional committee. Though it was opposed by the Administration as represented by the Justice Department, this bill fared better than the first, which never reached the floor of the Senate. The McCarran bill was approved by the Senate Judiciary Committee in April, 1953, but had a cool reception in the Senate chamber where Senator Taft delayed a vote and even some of those who ultimately voted for it expressed only guarded approval. Legislators and legal authorities pointed out both that the measure might permit the guilty to escape federal prosecution and that it might not, on the other hand, include immunity from prosecution by the states. Opponents of the bill were fearful of the extent of the protection which a few men could provide and of their power to influence witnesses. Critics pointed out that an investigating committee could seriously embarrass the Justice Department and obstruct its operations by granting immunity to a man at a time when he was facing indictment.

Subsequently, Senator Kefauver proposed an amendment which provided that a committee give the Attorney General a week's notice before granting immunity; but Senator Taft was "dubious" about the bill and Senator George, even when he voted for it, said that he did so with much misgiving. The Senate passed the bill in April, 1953, and when last seen, it was headed for the House Judiciary Committee.

But if we insist upon forthrightness on the part of the person being investigated, we must likewise insist that his accuser be named and held responsible for his accusations. Americans who make it a practice to disregard anything which is said in an anonymous letter cannot tolerate statements made by an anonymous witness. When anonymity removes all bars to reckless, inaccurate or even vicious statements, there is no limit to the damage which they can inflict. Since it is impossible to unsay that which has been said and since accusations always make bigger headlines and deeper impressions than retractions, it is hard enough under any circumstances, to repair the damage done by a careless word; but when the source of testimony is withheld the accused has no recourse whatsoever.

Until we have a change in the rules, obviously we must abide by them not only to the letter but in the spirit of that fair play which is our boast. There should be no exceptions to this policy, either on the grounds of privilege or of congressional immunity.

It is the duty of a citizen to cooperate with the government. Traditionally, the honest man has scorned the refuge of the Fifth Amendment and has preferred to answer fully and truthfully, trusting to a fairly conducted trial for his ultimate vindication. Although a legislative investigation is not completely analogous to a trial, many legal authorities and many educators whose institutions have had reason to become familiar with investigative techniques have expressed disapproval of the practice of invoking the Fifth Amendment. On the other hand, we hear repeated protests against privileged testimony of an irresponsible nature. The admission of such testimony is injurious not only to the individual whom it may defame but to society as a whole. It is a shameful violation of our ethical principles and one of its immediate effects is to cause innocent and highly qualified persons to avoid positions in which they may be subjected to indignity and defamation. When this happens the public interest, instead of being protected, is actually weakened by the loss of valuable teachers and public servants.

In other words, all privilege must be counterweighted with responsibility. Freedom of speech does not include freedom to slander. Academic freedom to pursue the truth entails the obligation to abjure untruth. Congressional immunity carries with it the duty to abstain from making reckless accusations. Privileged testimony must be honest, and refusal to testify must rest on proof that the testimony would really tend to incriminate. And when proceedings are published newspapers must remember that freedom of the press does not include freedom to try cases in the headlines or to usurp the rights of authorized investigators.

Altogether, it would seem that the problem is not to give the individual less protection, but to provide more for the public. It is one of the glories of our legal system that a man is innocent until he is proved guilty; but we commit an offense against the innocent public if we do not apprehend and prosecute the individuals who menace it. There are times, perhaps, when we are so intent on safeguarding the individual's constitutional rights that we forget that the Constitution also guarantees protection to the public. And there are times when fear and tension make us so anxious about the national welfare that we resent the limitations imposed in the interests of civil liberties. In essence the question is not so much a matter of whom we are protecting as of what we are protecting. We must protect the individual and we must protect the public, but we cannot do either to the best of our ability if we do not primarily protect the principles on which our free society is founded.

Lawyers and Social Security:

No Need for a Change

by Allen L. Oliver • Chairman of the Committee on Unemployment and Social Security

■ In 1950, The House of Delegates, speaking for the American Bar Association, adopted a resolution opposing the inclusion of lawyers in the Social Security program. Last summer at the Boston meeting, the Board of Governors requested the Committee on Unemployment and Social Security to make further studies on the question of voluntary coverage of the profession. Mr. Oliver, the Committee Chairman, here reports to the membership on the results of that study. The verdict: Neither logic nor reason warrants any change in the present Social Security laws to include lawyers.

■ The inclusion within or exclusion from the social security program of self-employed lawyers and other professionals is a controversial issue. There is now pending in Congress H. R. 9366, which vitally affects the legal profession. It is sponsored by the present incumbent of the White House. Similar proposals were sponsored by his two immediate predecessors. It is, therefore, not a partisan political issue.

The purpose of H. R. 9366 is to amend the present Social Security Act so as to bring approximately 10,000,000 people within the program including self-employed lawyers.

The social security movement is world-wide. The initial federal legislation in our country was passed in 1935. Its purpose was to provide security at the age of 65 to workers then and now being retired or discharged at that age. It specifically excluded self-employed members of the professions. To include them now would require a definite change.

Old Age and Survivors' Insurance is the primary issue involved. Under the present act, if one is employed and covered by the act for six quarters, that is eighteen months, he becomes eligible to payment of $85 per month when he reaches 65, *provided* he earns less than $75 per month and provided further that he continues to pay the tax until he becomes eligible to receive benefits. If he earns as much as $75 per month when he reaches 65, he gets nothing so long as he continues to earn as much as $75 per month until he reaches the age of 75. The *only bargains* are, (a) Men approaching 65 who quit completely at that age and earn less than $75 per month thereafter, and (b) Young men with families who have reason to believe that they will die in the next ten years, and do so.

In 1950, the American Bar Association, through action of its House of Delegates, approved by the Assembly, went on record as opposed to inclusion of lawyers within the program. That record still stands.

The present Committee was appointed after that action was taken. The present Committee, with the same personnel since its appointment in 1950, has consistently and unanimously approved of the 1950 decision of the Association.

In our annual and semiannual reports to the Association's House of Delegates, we have set out the arguments both for and against inclusion. We refer particularly to our 1952 report printed in the advance program.

In the November issue of the AMERICAN BAR ASSOCIATION JOURNAL, page 971, there appears a well-written article by Dean Larson, of the University of Pittsburgh, favoring the inclusion of lawyers within the program and giving his reasons. He courteously says therein that our 1952 report

> is a concise and scrupulously fair summary of the arguments for and against social security coverage which should be reviewed by all lawyers.

In the January, 1954, issue of the AMERICAN BAR ASSOCIATION JOURNAL, our Committee has an article opposing inclusion of self-employed lawyers together with our reasons.

At the Boston meeting (August, 1953), the Board of Governors requested that we withdraw our report reaffirming our position and the American Bar Association's position —and make further studies with particular reference to voluntary or elective inclusion—giving each lawyer the right to elect whether he would come in. We should add that once an election is made, it would be made irrevocably for all his life.

Accordingly, we wrote a factual

letter to every state bar association, to the fifty largest local bar associations and to fifty smaller bar associations throughout the U. S. A. We made a chart showing how every association voted. The results as of March 8, 1954, were as follows:

State Bar Associations:	
For compulsory	2
Against compulsory	4
For voluntary	4
Against voluntary	4
Not yet ready to report	11
Large Local Associations:	
For compulsory	2
Against compulsory	2
For voluntary	5
Against voluntary	1
Not yet ready to report	5
Smaller Locals:	
For compulsory	1
Against compulsory	3
For voluntary	1
Against voluntary	3
Not yet ready to report	2
Totals:	
For compulsory	5
Against compulsory	9
For voluntary	10
Against voluntary	8
Not yet ready to report	18

On Thursday, March 4, 1954, at the Association's Regional Meeting in Atlanta, Georgia, we had a panel discussion scheduled for one hour and thirty minutes. Great interest was evidenced and we were urged to continue for an additional ten minutes and did so. The panel consisted of our committee members exclusively. Those present and participating were Harry G. Waltner, Jr., of New York, Howard Holtzmann, of New York, Harlan S. Don Carlos, of Connecticut, and Leslie P. Hemry, of Massachusetts. Only Miss Donlon, of Albany, and Mr. Elliott, of Pittsburgh, were absent.

Cost—At the present rate the cost to a self-employed lawyer on the present $3600 base is $108 per year. There are approximately 225,000 lawyers in America and this would mean approximately $25,000,000 per annum out of their pockets. Almost no attention is given to H. R. 9366 by the average lawyer! Remember, Mr. Average Lawyer, you get nothing until the age of 75.

This is not insurance. You get no policy. You have no vested or immutable right even to the return to you of what you have paid in to the fund in the way of taxes. It is a matter of legislative policy. You have no contractual relationship with the Government. A recent Massachusetts case (1953), citing three United States Supreme Court cases, announces such a rule.

Approximately 18 billions of taxes have been collected under the Social Security program, but the money has been used by the Government for other purposes and U. S. bonds have been placed in the trust fund. When the economic situation is such as to require the use of those trust funds, you and I will have to buy Government Bonds to furnish the money. Some actuaries say that a trust fund of $200,000,000,000 would be required to establish a proper reserve.

There are basic social and economic differences between employed persons and self-employed professionals:

(a) Most employees stop working at 65. We do not.

(b) A worker's retirement at 65 is usually mandatory and precipitous. Ours is not.

(c) The act was designed for "workers" and so names them; it specifically excludes us as self-employed lawyers.

(d) The Jenkins-Keogh bill provides for laying aside a certain per cent of earnings as tax-exempt income if it be placed in a retirement fund in trust for old age. We favor that bill.

We oppose inclusion of self-employed lawyers in the program on a compulsory basis as provided in H. R. 9366 because (a) on principle, we are against regimentation of our profession; we are against selling our birthright for an illusory mess of pottage and illusory expectancy *in futuro,* and (b) it will cost the members of the profession more than they will ever get out of it. We would be supporting an admittedly socialistic welfare-state pillar. The young lawyer would pay more and get less than anyone else we know of and could not therefore be benefited by it.

We are asked to make a special study of the so-called voluntary or elective inclusion of self-employed lawyers. We have. That was the Lodge Bill. It died a natural death in Congress.

These are the reasons why we are opposed to voluntary inclusion—to letting each lawyer choose for himself whether he wishes to be covered:

(a) It is not sound economically, on an actuarial basis. It will cost members of the profession more than they will reap. There will be a few exceptions, but few.

(b) It is discriminatorily in favor of a class—our class—and very bad from a public relations standpoint. Why should lawyers and doctors have an election privilege not accorded to others?

(c) It would sow dissension, both within and without the profession. If one elects to go in, he will wish he had stayed out: if he stays out, he will wish he had gone in. Once he elects to go in, the decision is irrevocable. He is stuck.

(d) It would ultimately result in compulsory inclusion, and probably at an early date.

(e) It is a sweet sounding, beguiling, and illusory compromise. In practice it will not work.

(f) We find no rank and file clamor for a change from the present status. If there were such a clamor, the poll would have shown it. Up to March 8, only twenty-four out of 150 bar associations contacted have expressed an opinion, and of those twenty-four only eleven have voted for voluntary inclusion. The heralded grass-roots opposition to the Association position has not been in evidence. The situation, as we find it now, is quite similar to that we announced in San Francisco in September, 1952.

Neither logic nor reason nor the results of the poll warrant a change in our position.

The Obligation Not To Remain Silent:

Invoking the Fifth Amendment

by Sol M. Linowitz • of the New York Bar (Rochester)

■ Despite the furor about the Fifth Amendment and its guaranty that no one shall be required to give evidence against himself, it can be assumed that no thinking person is in favor of eliminating a portion of the Bill of Rights. The question is how best to preserve those rights. Mr. Linowitz says that the witness who asserts the privilege with the thought that he is thereby strengthening it is mistaken, that it actually strengthens the privilege to refrain from asserting it at times when it might be claimed.

■ In much of the discussion going on about freedom these days we seem to be focusing on the wrong things. All talk about the principle of the right to speak, to think, to believe, to teach, ignores the fact that the principle of these freedoms is not in issue and probably never will be. Men on all sides of a question involving congressional investigations, for example, will readily agree that nothing should be done to impair fundamental guarantees of due process of law. Investigator and investigated alike will, with roughly the same passion and eloquence, argue that the maintenance of law and order and, indeed, the future of the nation will depend in large measure on whether or not basic freedoms spelled out in the Bill of Rights are carefully preserved. Where the differences arise (as differences in these matters always arise) is in what we try to do with these principles, the way we deal with them in this or that situation.

There is, of course, nothing new in any of this, yet until it is clearly understood it will just not be possible for us to get our sights fixed on the right things about the real meanings of freedom. By the same token, once this is really understood, then it will no longer be surprising to find Dean Acheson, Philip Jessup or Owen Lattimore—arguing that in a democracy such as ours a man in public life should have the right to be called wrong without being called evil—in complete agreement on this issue with a Senator who put it this way: "Every man in public life expects criticism—the kind that stems from honest differences of opinion. There is often a vast difference between what a public official thinks is right and what his critic thinks is right. . . . This type of criticism is to be expected by anyone who enters politics. It is a far cry, however, from the Communist smear technique and character assassination of anyone who believes in and works for the preservation and improvement of our way of life under a system which guarantees the individual the maximum amount of freedom."

The fact that the Senator in question was Joseph R. McCarthy may make the point more dramatic but does not affect its validity.

The important—the vital—thing is the need for going beyond this to decide what is at stake and where and what must be done in order to preserve that which is truly precious. Take the witness before a congressional committee who is "opposed in principle" to the way the committee operates or to the tactics of a particular Senator or Congressman. In protest, the witness decides to assert a privilege to remain silent under either the Fifth or the First Amendment. Forgetting for the moment the risk of possible punishment for contempt if the privilege is improperly invoked, and assuming that the action is taken in all good faith, who gains and who loses today when such a witness chooses to remain silent? Granted that no legal implication may properly be drawn in any judicial proceeding from the refusal to answer, who can today misunderstand the consequences which will flow from this action? Will the committee be spurred or retarded in its objectionable procedures—will it lose or gain ground—because such a witness keeps his lips sealed and thereby (whether we like it or not) helps to give substance to the suggestion that by his silence he is covering up valuable evidence which might have a direct bearing on our national security? In short, does not the silent wit-

ness in such a case by his very silence best help to strengthen precisely that which he so strongly opposes?

I am not talking here about legal or moral rights. What I am trying to put down are some plain hard facts about real and practical effects: that the privilege against self-incrimination is frequently strengthened by *not* invoking it; that the procedures followed by a congressional committee may often be most effectively opposed by a witness who, as he sits in the witness chair, does *not* oppose them; that the principles of freedom of speech and thought may sometimes become more firmly established by agreeing to answer questions which should not be asked and by speaking up when silence might be misunderstood.

This obligation not to remain silent in the name of a principle has broader and deeper relevance in other areas. There are today many people who candidly admit that they are greatly disturbed by the procedures of certain congressional committees or their individual members yet who refuse to speak out against them. They are silent, they say, because they believe that the principle of plucking out the Communist menace from within our gates is of first importance to us as a nation, and therefore they may regret but will not oppose those who follow distasteful procedures in getting the job done. The objective is, in their words, far more important than the particular way it is to be reached.

What is involved here, I would suggest, is of critical significance to all of our thinking and talking about freedom. For this kind of reasoning in support of a principle manages to override our own first principle—our idea that what we have here in this country is, above all else, a way of doing things, a way of proceeding after truth, a way of reaching an objective by weighing and measuring and accepting and rejecting in order to determine what is true and what is not, a way of making up one's mind with fairness and objectivity and always with deep respect for our basic presumptions of innocence and integrity; that the *way* we proceed here has to do with how we live, what we believe, and how we define freedom; and that ours is far more than a *right* to be free, it is a *way* to be free.

Here, then, is the real nub of the matter: Not that there are in Washington some few Senators, Congressmen, investigators and witnesses who pay lip service to high principles but betray or weaken them in practice, but that there are many more men in many more places who know or should know in their heart of hearts that bad things cannot be justified in the name of a high purpose without damaging and ultimately destroying that purpose. And many of us, who sit on the sidelines during the heat of the pursuit denouncing the misguided witness who has chosen to resort to alleged constitutional sanction for his silence, invoke for ourselves an even less justifiable refuge of silence with even less understanding and less sanction. Yet if anything is certain, it is that the force and virility of our freedoms will in the long run depend far more on how we act, those of us who are on the sidelines, than on the procedures followed by any congressional committee or the rantings and accusations of a particular member of Congress. Posterity will judge us not by the few who sought to despoil freedom, but by what the rest of us said and did or left unsaid and undone when words and actions were called for—by our courage and our posture—by our willingness to stand up and speak truth in the bright light rather than cower half-hidden and silent in the shadows.

Louis Brandeis carried with him always the wounds and pain of the bitter attacks made upon him before the Senate committee investigating his fitness to sit on the Supreme Court. When the fight was won, he said some things in a letter to his friend, Judge Amidon, which are words for the silent men of all times—ours as well as his:

"What has seemed to me the really serious features . . . were not the attacks of my opponents, however vicious and unfounded, but the silence or acquiescence of those who were not opposed to or were actually in sympathy with me. Most alarming is the unmanliness, the pusillanimity of those who believed that my efforts were commendable, but feared to speak out; feared because of either financial or social considerations or for the love of enjoyment or ease. And then the acquiescence of an equally large body of men who felt neither sympathy with nor opposition to my views, but who so lacked an active sympathy with the demands of fair play, that they were willing to remain silent, although they realized fully that my opponents were guilty of foul play.

"The silence or acquiescence was due probably quite as much to the overweening power, financial and social, to which our community has been subjected as to a demoralization through prosperity and failure to realize what is really worth while in life. . . . But whatever the cause—the existence of such servility and lack of manhood is a menace to democratic institutions and ideals."

Sol M. Linowitz practices in Rochester. A graduate of Hamilton College, he received his legal education at Cornell Law School where he was editor-in-chief of the *Cornell Law Quarterly*. He was a lieutenant in the Navy during World War II and also served as Assistant General Counsel in the OPA in Washington.

Northwest Regional Meeting

Exceeds Expectations

■ Another highly successful regional meeting—this one for the eight Pacific Northwest states—in Portland, Oregon, May 23 to 26, has furnished additional convincing proof of the growing value of regional meetings in furthering the work and objectives of the American Bar Association. But the brilliant success achieved this year by the Committee on Regional Meetings under the able leadership of E. Smythe Gambrell should not cause us to overlook the fact that much valuable spadework was done in the early days of the experiment by Burt J. Thompson, of Forest City, Iowa, first under the sponsorship of the Section of Bar Organization Activities, and later, as a member and chairman of the Committee on Regional Meetings.

More than 1,100 lawyers, judges, teachers and students participated in the Portland sessions. They came from the States of California, Nevada, Oregon, Washington, Idaho, Montana, Wyoming and Utah.

This meeting and the regional meeting held in Atlanta in March attracted more than 2600 members of the profession and from the standpoint of attendance and enthusiasm were clearly among the most successful held since the regional meeting policy was reinstituted in 1951. The regional programs are designed to decentralize the activities of the Association and to enable lawyers to participate actively and personally in them. That this objective is being accomplished was demonstrated by the fact that, at Portland, over three hundred lawyers who were not members of the American Bar Association registered for the meetings.

Portland is a beautiful city of about 400,000 at the confluence of the Columbia and Willamette Rivers amid the scenic splendor of the Cascade Range. Many of its 1,800 lawyers, working through committees under the general chairmanship of James C. Dezendorf, proved that the city's hospitality easily matches its beauty. Portland lawyers opened their homes for informal entertainment of the visiting guests. Special events were held daily for the visiting ladies, and the fact that the meeting occurred when the "city of roses" was in the full floral beauty of spring added to the enjoyment of special sightseeing tours. Complimentary receptions for all visiting lawyers and their ladies were other highlights of the social activity. The hosts at these receptions were the Multnomah Bar Association and the Oregon State Bar.

The Portland program was built upon the solid foundation of Section and Committee workshop sessions in which recognized authorities in the various fields of practice took part. The meeting thus did not rely upon noted outside speakers to attract the interest of lawyers. During the three-day meeting, eleven separate Section and Committee meetings and conferences were held, interspersed with Assembly sessions, luncheons, the main banquet and the social calendar. Besides the receptions and tours, the latter included daily "coffee hours" for lawyers' wives and a fashion show and tea at the Waverly Country Club with the wives of Portland lawyers as hostesses.

Sections of the Association which arranged special programs were those of Taxation; Corporation, Banking and Business Law; Labor Relations Law; Real Property, Probate and Trust Law; Administrative Law; Municipal Law; International and Comparative Law; Insurance Law, and Judicial Administration. Committees sponsoring special programs were those on Legal Assistance to Servicemen, the Lawyer Referral Service and the Committee on Continuing Legal Education of the American Law Institute collaborating with the American Bar Association.

A sizable representation of the American Bar Association's "official family" took part in the program. President William J. Jameson presided at the opening Assembly session and at the main banquet on the evening of May 25. He also addressed the Assembly and a noon meeting of the Portland Chamber of Commerce forum. Chairman David F. Maxwell of the House of Delegates spoke on the subject: "India—Far East Bastion of Democracy" at the banquet. He was introduced by Loyd Wright, of Los Angeles, President-nominee of the Association. A second principal address at the banquet was delivered by E. Smythe Gambrell, Chairman of the Regional Meetings Committee, who spoke on the subject "The Organized Bar of America". He was introduced by Charles S. Rhyne, of Washington, D. C. U. S. Judge Arthur F. Lederle, of Detroit, Michi-

gan, Chairman of the Section of Judicial Administration, spoke on the subject "What the Public Expects of the Courts" at an Assembly luncheon.

Chairman Maxwell discussed personal observations and conclusions reached on an extended visit to India and the Far East last year. He expressed the belief that the United States should continue to support the government of Prime Minister Nehru as democracy's best hope for peace in Asia.

Mr. Gambrell traced the growth of the regional meetings program and declared: "Thousands who heretofore have been non-members, or inactive members, of the Association are being attracted to it, for the first time are enlisting in its fine civic enterprises and, in turn, are profiting from the manifold advantages which the Association has to offer. The constructive possibilities of Regional Meetings in our national bar program are unlimited. Much which has been assigned to the Annual Meetings in the past may well be transferred to the functions of the Regional Meetings."

In his address at the opening Assembly, President Jameson emphasized the progress of the American Bar Center campaign and the great potential of the project. He reported that the $1,500,000 fund drive among the nation's lawyers had passed the $1,300,000 mark and that every effort is being made to complete the fund by the time the Center is dedicated August 19 in connection with the Association's Seventy-seventh Annual Meeting in Chicago.

One of the feature events of the Portland program was a luncheon of the American Judicature Society at which a newspaper publisher, a federal judge, and a radio executive discussed Canon 35 of the Code of Judicial Ethics, prohibiting the photographing, broadcasting or televising of courtroom proceedings. Participants were: U. S. District Judge George H. Boldt, Tacoma, Washington; William W. Knight, publisher of the *Oregon Journal*, of Portland, and T. Lawson McCall, an executive of Portland radio stations and recently chosen as Republican nominee for Congress in the third district of Oregon. Loyd Wright, as Vice President of the American Judicature Society, presided at the luncheon.

President William J. Jameson (left) is shown with two of the four long-time members of the American Bar Association honored at the Portland regional meeting. In the center is Horton C. Force, 76, and at the right, Harry Ballinger, 86, both of Seattle, Washington. This month Mr. Ballinger will complete sixty-eight years of active law practice, having been admitted to the Bar in the State of Kansas at the age of 16. Mr. Force has been in active practice fifty-one years. Others honored as members of the Association for forty-six years, but not present at the Portland meeting, were John C. Higgins, of Portland, and Elmer E. Todd, of Seattle.

Other featured speakers during the Portland sessions included Major General Reginald C. Harmon, Judge Advocate General of the U. S. Air Force, and Ambassador Merwin L. Bohan, United States representative on the Inter-American Economic and Social Council.

An interesting highlight of the opening Assembly was a brief ceremony recognizing four long-time members of the Association in the Northwest area. Two of the four were present: Harry Ballinger, eighty-six years old; and Horton C. Force, seventy-six, both of Seattle. The others who were recognized, but who were unable to be present, were John C. Higgins, of Portland, and Elmer E. Todd, of Seattle.

Archibald M. Mull, of Sacramento, California, Chairman of the Membership Committee of the Association, introduced the senior members to the Assembly audience and paid tribute to their long and loyal devotion to the Association and to the aims of the organized Bar.

AMERICAN BAR ASSOCIATION

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EDITORIAL OFFICES

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Signed Articles
As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

■ *The Role of the Lawyer in a Revolutionary Era*

Inexorably the events of each passing day add to the cumulative evidence that we are living in the most profound revolution of all recorded history. What has already happened and what portends prove that the present upheaval is seismic in nature and transcends even the American Revolution, the French Revolution, and the Russian Revolution.

Challenged are the institutions which we have believed to be the fruit of man's long struggle from slavery towards freedom. Impugned are the religious faiths that each of us learned at his mother's knee and which, for each man, constitute the core of his conscience.

This defiant challenge is gaining a dominion over men's minds and achieving a territorial expansion that is terrifying. A multitude of human beings seem to be persuaded that communism is better than democracy, that the state is more important than the individual, that Marxist materialism is superior to Christianity.

From Greenland's icy mountains, from India's coral strand, from all around the world the hopes and fears of all the years are centered upon our own country. Millions of souls look upon us as the last bastion of liberty.

Within our nation, a distraught citizenry yearns for positive leadership. We want democracy to prove itself again as in the time of Abraham Lincoln. He was gentle, patient, kind and forgiving; but on the central issue—the preservation of the Union—he was adamant. He laid out a course of action from which he would not swerve; he explained it to the nation at Gettysburg; he inspired the people and their reaction replenished his faith.

As schoolboys we were taught that the Roman Republic was corrupted by "bread and circuses". From Gibbon we learned that Nero fiddled while Rome burned.

Responsible editors have described one current happening in our country as resembling a circus much more than a legislative hearing. Any demagogue can furnish the bread, thus fulfilling "*panem et circenses*".

Anxious fathers and mothers—thousands upon thousands of them—wonder whether the ambassadors at the recent Geneva Conference were talking and fiddling while gallant French troops were dying in the burning ruins of Dienbienphu.

On this event, the Communists can and will build a legend which to the Asiatics will be as meaningful as are Concord, Lexington and Bunker Hill to us. The facts enable the Communists to go further. At Verdun, the free nations declared "They shall not pass" and the enemy could not pass. At Dienbienphu, as at Thermopylae, men gave their lives but sheer bravery was not enough, and the enemy triumphed.

What can we do? And especially what can we do as lawyers?

In a democracy, the President cannot do it all alone, neither can the Congress: the whole people must take their parts and act in the tradition of free men. When a ship is in distress on the high seas, each member of the crew goes to his station and performs his appointed duty.

The tasks appointed to lawyers are plain, unequivocal and of crucial importance. The future of Western civilization depends on law and law necessarily depends on lawyers.

Mankind learns only through experience, by the painful process of trial and error. Because of our national success in certain fields—especially the material—the eyes of the world are centered on us.

Actually lawyers do know how to open wide the doors of future peace, opportunity and justice. They did precisely that when they wrote the Constitution of the United States.

To prepare ourselves for our appointed task it is well to pause for a moment of meditation, self-examination, communion and confession.

We proclaim that every man is entitled to his day in court. We could guarantee that, but we have failed to do so. Shining examples of achievement in the field of law and order might be more impressive in the present temper of the world than material progress.

The lethal weapons that will be used if World War III comes have been designed, manufactured and are

ready. They will be unleashed unless the passions and angers of peoples can somehow be curbed and restrained. The best regulation is that of international justice according to international law.

Lawyers can be the architects of that structure. Insuperable as the difficulties may appear, we can take courage from the fact that our predecessors in the legal profession established the King's peace (criminal law), the peace of the market (commercial law) and peace of mind (religious freedom, right of privacy—every man's home is his castle). The peace of the town was extended to the realm and it can be extended to the world.

Lawyers have to deal with people at their worst and know the necessity of a legal order; also they see people at their best and so retain their faith. They understand the fateful words in the nineteenth verse of the thirtieth chapter of Deuteronomy:

> I call heaven and earth to record this day against you, that I have set before you life and death, blessing and cursing: therefore choose life, that both thou and thy seed may live.

For the realization of our professional responsibilities and opportunities, the necessary machinery exists and is becoming more effective every year. It is the bar association. Dean Pound has said that the tests of a profession are (1) organization, (2) education, (3) the spirit of public service. Dean Harno has written that the bar association is the fulcrum that enables lawyers to exert their maximum influence.

As we take our places and do our work in the ranks of the organized Bar, let us keep ever in mind the fact that the bar association is the *fighting arm* of the legal profession.

■ *Justice in Unpopular Causes*

The article by Kenneth Royall entitled "American Freedom and the Law", appearing in this issue, calls attention to the need of eternal vigilance in order to keep the processes of American justice free of bias and unfairness in the face of the popular emotions and hatreds of the moment. Mr. Royall highlights his thesis by what he calls the case system. By way of illustration he cites: (1) The trials arising from an attempted lynching in his home state of North Carolina thirty years ago, locally known as the "Battle of Wayne Court House"; (2) The effect on judicial proceedings of the Al Smith presidential campaign of 1928; (3) The trial of the eight German saboteurs in World War II and (4) The Nuremberg trials of the German war criminals.

He undertakes to apply the lessons to be learned from these cases to the present day when public emotion on the Communist issue puts great pressure on the Bar to sidestep the defense of such cases and makes "fair trials more difficult". He states the principle on which all Americans can agree, as follows: "The real test of our American system of justice is not whether we treat fairly those with whom we agree, but whether we treat fairly those with whom we do not agree." And then he poses the question: "Are we meeting this test today?"

We join in the question: Are we?

■ *Sober Second Thought*

Writing in the *Harvard Law Review* back in 1936, Harlan F. Stone referred to the "sober second thought of the community, which is the firm base on which all law must ultimately rest". Speaking more recently at Mt. Holyoke College, Dean Erwin N. Griswold expressed his great faith in the sober second judgment of the American people. In this sober second thought of our people lies the solution of the current hysteria created by the problem of McCarthyism v. Communism.

There is no doubt that the recent excesses of some congressional investigating committees have deeply disturbed American lawyers. Some lawyers have had the courage to publicly condemn such tactics. Lawyers recognize the imperative need for Congress to have current, up-to-date, factual data upon which to pass federal legislation. They recognize that wide latitude must be given Congress in making such investigations. Yet it cuts lawyers to the quick to see witnesses put in a situation which a federal court has aptly described as a "triple threat": (1) if you answer truly, you will give evidence which may convict you; (2) if you answer falsely, you will be convicted of perjury; and (3) if you refuse to answer, you will be found guilty of criminal contempt. Such a situation breeds uneasiness, suspicion and fear. When distortion, intimidation and coercion are added to the picture, it is high time for lawyers to take a hand in the business.

In investigating Communism, the amateurs to date have not shown a modicum of the proficiency which the Federal Bureau of Investigation has already demonstrated time and time again. There are numerous reasons for leaving spy-hunting to those professionally equipped to do it. Congressional committees have proved that they are not best equipped in this field. That does not mean, however, that they should be denied the right —if they could be—to investigate Communism or any other matter of importance to the nation. Yet lawyers recognize that the fundamental liberties of the American people can be endangered just as much by an orgy of anti-Communist spy-hunting as they can by the 25,000 hard-core Communists recently mentioned by President Eisenhower in a television broadcast to the nation. American liberties can be destroyed just as effectively by Fascist-mindedness as they can be by Communist-mindedness. What we need to recognize is that we need not adopt either perilous alternative in the present situation. We can still choose the American way.

The American Bar Association will welcome at its Annual Meeting in August the forthcoming report of its Special Committee on Individual Rights as Affected by National Security, headed by the highly respected, highly competent Whitney North Seymour, of New York City. Mr. Seymour is already nationally recognized

as an outstanding lawyer in the field of civil liberties. His committee will, no doubt, have proposals relating to procedures for our investigating agencies. These proposals will be based upon the sober second thought of the capable, qualified lawyers whose loyalty to our American institutions is unimpeachable. Congress and the public are much in need of such sound advice today. Our people recognize that we need investigating procedures and procedural standards which will be fair as well as effective. In such fair procedural standards we will find security both for our lives and our liberties.

Justice Brandeis was a stickler for getting at all the facts. He also wrote this:

> At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law, and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play. [*Burdeau* v. *McDowell*, 256 U. S. 465, 477 (1921)].

If we adopt procedural standards for our congressional investigating committees in the spirit evinced by Mr. Justice Brandeis, then America can avoid both the Scylla of Communism on the left and the Charybdis of McCarthyism on the right. The American people properly look to American lawyers to lead them in establishing those standards of fair play which decent men can approve.

■ *Public Relations and Lawyer Referral*

We speak much of "public relations". But even as we seek to persuade others of our virtues, let us not forget the obligation resting upon us to deserve by our conduct the confidence we ask. Let us remember our duty to render service which of itself makes of our occupation an honorable profession.

This is being developed in three directions—legal aid work, legal assistance to servicemen and lawyer referral service. Each complements the others and all are growing. But they must be brought to a point of high efficiency and maximum coverage. Until the organized Bar can say that legal service is available for all who need it at a cost within their means, we may not rest upon our oars.

We have builded well but the road to our goal is still long and the requirements exacting.

Mr. Voorhees, under whose leadership the growth of lawyer referral service has made marked progress, tells us in this issue of what has been accomplished and gives us an outline of what remains to be done. His report is encouraging.

It is doubtful if any other activity of the American Bar Association will ever inspire as much confidence as the assurance that no one need seek in vain for legal advice and help because of small means or poverty.

Frank E. Holman of Seattle Receives William Volker Distinguished Service Award

■ Frank E. Holman, of Seattle, Washington, past President of the American Bar Association, was awarded the $15,000 William Volker Distinguished Service Award for the year 1954, it has just been announced by the William Volker Fund at Burlingame, California.

Mr. Holman has had a distinguished career since graduating from the University of Utah in 1908. He spent three years at Oxford as a Rhodes Scholar. He was Dean of the Law School of the University of Utah, from 1913 to 1915. He practiced law in Salt Lake City from 1915 to 1924, and has practiced in Seattle, Washington, since 1924. He has engaged in many civic activities; he was Chairman of the Alien Enemy Hearing Board for Western Washington during World War II, and has been President of the Seattle and Washington State Bar Associations.

In 1953 Mr. Holman received the American Bar Association Medal, the highest award within the gift of the Association, for distinguished service in the cause of American jurisprudence for having aroused the interest of the American people and of the Congress in the problems of treaty law and its bearing on the legal and constitutional systems of the United States.

Mr. Holman received the Veterans of Foreign Wars' "Certificate of Merit" in 1950; the United States Marine Corps League Meritorious Service Award in 1951; the American Freedom Award in 1952; and the Veterans of Foreign Wars' Gold Medal Award in 1953. He was also selected as Seattle's "First Citizen" for the year 1953.

The Volker Fund announced that the award was made in specific recognition of Mr. Holman's long and exemplary record of unselfish participation in public life.

The Office of Master in Chancery:

Colonial Development

by James R. Bryant • Judge of the Superior Court of Cook County (Chicago, Illinois)

■ In the June issue of the *Journal*, Judge Bryant discussed the early English history of the office of master in chancery. The present article is a continuation of his examination of the role of the masters in legal history, tracing the growth of the office after it was transplanted in the American colonies from its English soil.

■ By the beginning of the seventeenth century when England entered into her great colonial period in America, chancery had become an integral part of the system of English jurisprudence, the machinery for administering chancery had been well developed and masters in chancery had become an essential and important part of that system.

When Englishmen came to found the first colonies in America, Jamestown in 1607 and Plymouth in 1620, they naturally brought along the essential elements of the system of law and order with which they were most familiar. It was inevitable that the system of law which they applied would, by the nature of the life and social problems of the colonies, be very much simpler than the system of jurisprudence in the England which they had left.

As the remedies of chancery were extraordinary and generally arose out of a more complicated society, they were not the first portions of law to make their appearance. Indeed, as might be expected, the maintenance of law and order and the protection of property in its primitive stages had first call upon the administration of the law in the colonies, and the earliest cases dealt with criminal offenses, offenses against the person and to some degree the protection of property rights. As the essence of chancery jurisdiction is an appeal to the sovereign power, the earliest cases in chancery are probably to be found in the highest tribunal administering justice as being the closest to the sovereign power.

As masters in chancery were a part of the administration of equity which became necessary when there was more equitable work than the court of chancery could perform, it was obvious that the masters in chancery would come later in the development of machinery to administer justice in these primitive communities.

Jamestown and Plymouth Were Corporate Ventures

The first colonies at Jamestown and at Plymouth were both corporate adventures. Charters had been granted to The London Company and to The Plymouth Company. These charters provided that the stockholders were to live in England and to govern the colonists as vast plantations.[1] The colonists were regarded as the employees and servants. They were to be governed by local councils or boards of overseers appointed by the stockholders. When the first band of settlers landed at Jamestown in 1607, they brought with them sealed orders from the stockholders and officers of The London Company. Those instructions provided that the disputes of the colonists should be taken to the president and the council of the colony of the company who were appointed by the same instructions. It is to be noted that this arrangement provided for the merger into one group of judicial, executive and legislative power to govern the colonists, and at the same time it was not strictly a governmental function that was performed but a corporate function. The power rested not at all upon the will of the governed and only indirectly upon the sovereignty of the King. Its real basis was the right of an employer to maintain law and order among its employees.[2] The instructions provided that the colonists were to be governed by the existing laws of the government and the church. It is clear, however, that

1. Archer, *The History of the Law* (1928) page 245.
2. Chumbley, *Colonial Justice in Virginia* (1938) page 3.

where precedents were not available, the council took such action as provided for the best interest of the community and caused proclamations to be issued governing a repetition of the circumstances involved. There was something of the basic idea of chancery even in that primitive idea of fitting the remedy to the situation.

During the succeeding years the colony at Jamestown was governed sternly by the firmness of Captain John Smith, who was followed by the tyrannical Sir Thomas Dale, who approved—among other things—the penalty of death "for refusing to answer the catechism of a clergyman". In 1619, however, a substantial revolution in the administration of justice took place in Jamestown. Sir George Yeardley, who was the newly appointed Governor, arrived in April and announced that thereafter the people were to be "governed by those free lawes which His Majesty's subjects lived under in Englande".[3] A representative assembly to be elected by the inhabitants of the various settlements was authorized with the power to "make and ordain whatsoever lawes and orders should by them be thought good and profitable". That assembly, known as the House of Burgesses, met on August 9, 1619, and in addition to its legislative function, in two cases acted as a court of justice trying criminal cases.[4] Five years later, the Charter of The London Company was cancelled and Virginia became a royal province. The King reappointed the old governor and council but, although the assembly entreated the King to allow it to retain its place in the governmental structure, it was not until 1628 that an annual convening of the assembly was authorized.

By the year 1623-1624, the assembly passed laws authorizing the establishment of the first known inferior courts in the colonies, the monthly courts in Charles City and Elizabeth City with jurisdiction limited to one hundred pounds of tobacco for petty grievances; an appeal was provided to the governor and council.[5] By March of 1628-1629, commissions were issued to certain persons granting power and authority to determine suits and controversies at Elizabeth City.[6]

By this time the settlement at Plymouth had been made. A charter of incorporation was obtained from the Crown. In Massachusetts, the same difficulty arose in applying the law of England to the primitive society which had been established in Massachusetts. Throughout the colonial period, there was a running battle between the inhabitants of Massachusetts and the King in regard to the powers which the local inhabitants had under the charter and how far they were circumscribed by it. Not only was the administration of justice and the application of the English law limited in Massachusetts by the fact that the colony was a charter colony, but justice was also given a peculiar application because the colony had been formed for religious reasons and the local authorities in administering the law administered it largely on the basis of the scriptures which resulted in a sort of natural law modifying the established jurisprudence of England.[7] This resulted in a system which had some of the general aspects of chancery.

There were three types of British colonies: the royal colony, such as Virginia; the charter colony, such as Massachusetts; and the proprietary colony, such as Pennsylvania. All of the proprietary colonies were, of course, owned by the proprietors, who were in effect little monarchs, but even so, the colonists and the proprietors drew from their common heritage of the English law to meet the needs of a new and primitive civilization.[8]

New York itself is a special case somewhat affected by the fact that it was originally settled by the Dutch, but after its acquisition by the English in 1664, the influence of the English common law was evidenced. Thus we see that throughout all of the English colonies the legal system established, if not entirely based upon, was largely influenced by the legal system existing in England at the time.

Massachusetts General Court Exercises Chancery Jurisdiction

In Massachusetts, after the charter of incorporation had been granted to the colony, the free men chose a governor, deputy governor and eighteen assistants, and the General Court met quarterly. Its first meeting was held at Charlestown in 1630 and for fifty-five years it exercised extensive jurisdiction in chancery, granting such well-known equitable relief as reformation, redemption from mortgages, regulation of charitable trusts, sequestration of property and cancellation and discovery; in 1685, these powers of the General Court were transferred in part to the various county courts.

Shortly thereafter, the original charter was abrogated and a royal governor was appointed. An act was passed establishing a court of chancery to be held by the governor or his appointees with an appeal directly to the King. In 1691, a less liberal charter was granted and in 1692 an act was passed which provided for a high court of chancery, but it never received the approval of the King and the act re-establishing the courts in 1699 made no provision for a chancery court.[9]

Then began the long conflict as to whether the courts in Massachusetts had chancery jurisdiction or not. It was argued that the law of 1699, which constituted the courts in Massachusetts, in providing for jurisdiction "as the Courts of King's Bench, Common Pleas and Exchequor within his Majesty's Kingdom of England have or ought to have", was sufficiently broadened by the words

3. Archer, *op. cit. supra* note 1, at 246.
4. 1 West, *History of the American People*, page 33.
5. 1 Hening, *Statutes-at-Large, being a collection of all the Laws of Virginia* (1619-1792) page 125.
6. *Ibid.*, page 132.
7. Reinsch, "The English Common Law in the Early American Colonies", 1 *Select Essays in Anglo-American Legal History* (1907) page 130.
8. Kocourek, "Sources of Law in the United States of North America and Their Relation to Each Other", 18 *A.B.A.J.* 676 (1932).
9. Wilson, "Courts of Chancery in the American Colonies", 2 *Select Essays in Anglo-American Legal History*, page 779.

ought to have to create a Court of Chancery.[10]

The opposing viewpoint was that there was no court of chancery in the charter governments in New England nor any court vested with power to determine causes of equity except for a limited jurisdiction for release of mortgages, bonds and other penalties contained in deeds. This view was described by Benjamin Pratt, one of the leading Revolutionary lawyers in Massachusetts, as being the prevailing one at that time.[11] Chancery jurisdiction in Massachusetts continued in that confused state until the Revolutionary War.

In Rhode Island, Connecticut and New York, there was constant agitation in the eighteenth century in regard to the establishment or the failure to establish a court of chancery and the use or abuse of equity powers by the various governmental agencies.[12]

Pennsylvania, as a proprietary colony, had a slightly different history. The proprietor, William Penn, was at one period not in favor of chancery courts and said that the Indians were "not disquieted by bills of lading or exchange nor perplexed by chancery suits".

In 1684, the Pennsylvania Assembly passed a bill providing that "every court of justice shall be a court of equity as well as of law".[13] Thus was achieved a union of law and equity in the jurisprudence of Pennsylvania.[14] In 1702, laws were passed establishing courts of chancery, but they were repealed in England.[15] Similar acts were passed in 1710 to 1715, but were repealed shortly after passage.[16]

In 1720, when Governor Keith was the Governor of Pennsylvania, a resolution was passed by the House of Representatives providing that the Governor be desired to open and hold a court of equity. He pleaded his want of experience in judicial affairs, and it was finally agreed that the decrees he made as chancellor should be made with the assistance of other counselors. This separate court of chancery existed until about 1736.[17] Under Governor Keith, it exercised jurisdiction in matters of account and partition, subjected real estate to the payments of debts and legacies, enjoined waste and proceedings at law, took the testimony of nonresident witnesses, settled accounts between partners and even issued writs of ne exeat.[18] It was in every sense a true court of chancery. Governor Keith's term of office was terminated largely because of a quarrel which he had with the heirs of William Penn, but this separate court of chancery continued until 1736 under his successor.[19] Subsequently, there was conflict as to whether the province had the right to establish a court of chancery under its charter of privileges,[20] and no separate court of chancery was ever again established in Pennsylvania.

In Delaware and Maryland either the lord proprietor or someone designated by him acted as the chancellor prior to the Revolution.[21]

After Virginia became a crown colony, the governor and council continued to exercise the judicial authority. At first there were no regular meeting days provided for court work, but later it was established that the Governor and Council should meet as a court four times a year. Thus, it became known as the Quarter Court. Later its name was changed to the General Court, and throughout the colonial period it remained the highest court in the colony. From its earliest inception, that court had general, criminal and civil authority and undoubtedly exercised chancery jurisdiction under that heading.

As has already been pointed out, the business of administering justice became so great in Virginia that it was necessary to take the courts to the people and the monthly courts were also cognizable in them.[22]

As early as 1645, the House of Burgesses had passed an act providing for the trial in the county courts of cases where the defendant desired relief in equity, outlined the place that a jury trial should have in such procedure and directed the court to make such orders as were necessary.[23]

In 1705, an act for establishing the general court and for regulating and settling the proceedings therein was enacted by the House of Burgesses. The act defined the jurisdiction of the court and set forth in detail the oath of a judge of the general court in chancery.[24] In 1710, an act for establishing county courts was passed by the House of Burgesses, and it provided that all the county courts should have jurisdiction in chancery.[25] The oath of a justice of the county court in chancery was also prescribed,[26] identical in form with the oath prescribed in 1705 for the judge of the general court in chancery. In 1727, the House of Burgesses enacted a law prescribing when chancery suits should be filed and the rules and methods to be put in practice and observed in relation thereto.[27]

By 1745, the chancery practice had become so important in Virginia that the House of Burgesses enacted a law setting aside the first five days of

10. Grinnell, "The 17th Century Provisions for Equity Jurisdiction in Massachusetts, and Their Relation to the Present Jurisdiction of the Courts", 31 *Mass. Law Q.* 56.

11. "The First Modern Administrator in Massachusetts", 31 *Mass. Law Q.* 12.

12. Wilson, *op. cit. supra* note 9, at 787-797.

13. Rawle, *Equity in Pennsylvania* (1868) page 9; Wilson, *op. cit. supra* note 9 at 797.

14. Reinsch, *op. cit. supra* note 7, at page 399.

15. Rawle, *op cit. supra* note 13, at 11-12.

16. *Ibid.*, at 16-17.

17. *Ibid.*, at 56.

18. *Ibid.*, at 26.

19. *Ibid.*, at 46-47.

20. Wilson, *op. cit. supra* note 9, at 797-801.

21. *Ibid.*, at 801-804.

22. Chitwood, "Justice in Colonial Virginia", 23 *Johns Hopkins University Studies in Historical and Political Science* 80.

23. Hening, *op. cit. supra* note 5, at 303.

24. Hening, *op. cit. supra*, note 5, Vol. 3 at 289-291: A Collection of All the Acts of Assembly, Now in Force, in the Colony on Virginia (Williamsburg, 1733) page 157: "You shall swear, That well and truly you will serve our Sovereign Lady the Queen, and her People, in the office of a Judge or Justice of the General Court of Virginia, in Chancery; and that you will do equal Right to all Manner of People, great and small, high and low, rich and poor, according to Equity and good Conscience, and the Laws and Usages of this Colony and Dominion of Virginia, without Favour, Affection or Partiality. So Help you God."

25. 3 Hening, *op. cit. supra* note 5, at 507.

26. *Ibid.*, at 509. *A Collection of all the Acts of Assembly, Now in Force, in the Colony of Virginia*, page 251.

27. *Ibid.* page 381 *et Seq.*

every general court for hearing and determining suits in chancery.[28] This indicates the growing importance of chancery litigation within the colony as its manner of living became more complicated, and by 1748 the House of Burgesses was prescribing additional rules of chancery procedure.[29]

In Georgia the royal governor had the same powers as the Lord High Chancellor of Great Britain, and in the Carolinas there was a court of chancery composed of the governors and deputies of the lords proprietor which decided cases on principles recognized in the English courts of chancery.[30] In practically every colony before the Revolution, there was either a court which generally and regularly administered equitable remedies or there was constant agitation among the people and often among the officers themselves for the institution of a separate court of chancery so that equitable remedies could be administered. This, of course, bears a rough analogy to the original growth of chancery in England out of the rigors of the common law and the inadequacy of the existing system of jurisprudence to grant relief. So in the colonies, in the absence of the courts administering equity, as the communities grew and developed, there was a need for equitable remedies and pressure was constantly brought for their establishment. It can be safely said, however, that prior to the Revolution, courts of chancery existed in some shape or other in every one of the thirteen colonies.[31]

The actual existence of masters in chancery during the colonial period and the nature of the duties which they performed are difficult to ascertain because of the lack of adequate records and the fact that at least in the early colonial period the chancery jurisdiction was so rare that it did not warrant the use of officers auxiliary to the chancellor. It is, of course, however, implicit that as the colonists knew of chancery and its jurisdiction as a part of their common heritage with England they also knew of the office of master in chancery and the administration of the courts of chancery of England.

It has been said by one authority that there were no masters in chancery in colonial Massachusetts.[32] That may be true, but it is equally true that in the first legislative session held under the Province Charter in 1692, the Superior Court of Judicature was established and Section 12 provided that there should be a high court of chancery within the province. It was provided that the court should be held by the Governor or by a high appointee assisted with eight or more of the Council, and that section was amended one year later to specifically provide for masters in chancery and for the reference of matters to them to make reports and "do what else is proper for masters in chancery".[33] It is, of course, true that these are the acts of the legislature which never received the approval of the King and therefore probably were never legally effective in Massachusetts, but they do indicate familiarity with the office and its functions.

Even earlier in Connecticut a similar law was enacted, for in 1686, a law was passed providing for a court of chancery to be assisted by five or more of the Council who would have the same power and authority as masters in chancery in England "have or ought to have".[34]

In 1720, when Governor Keith instituted his separate court of chancery in Pennsylvania, he appointed masters in chancery immediately as well as the registrar for the court. As far as the duties exercised by the masters are concerned, it would seem that in colonial Pennsylvania at least the masters in chancery exercised their powers more in accordance with the theory advanced in England that they were assistant judges than in the manner conceived by the enacted law of Massachusetts. The registrar's book of the court, which was found and published as an appendix to William Henry Rawle's essay entitled "Equity in Pennsylvania", showed that in at least six cases masters in chancery were present as members of the court;[35] in only two cases is there evidence of a reference to a master. In one case, an account which had been submitted had been referred to a master, and in another case it was ordered that one of the masters examine a witness on interrogatories.[36]

In Virginia, although chancery had developed so that certain special days were set aside for hearing of chancery matters in court and elaborate rules of procedure had been outlined, there is still no record of masters in chancery until after the Revolution. However in 1777, a high court of chancery was established which consisted of three judges,[37] but in 1788 the provisions were amended so that the court was reduced to one in number, and it was provided that the court could employ one or more commissioners and cause a reasonable allowance to be taxed in the bill of costs.[38]

Certainly in all the more populous colonies, there had been some effort to establish and use the office of master in chancery. The records available are few and fragmentary, but it is beyond dispute that just as chancery relief had been required and become a part of the judicial system of colonial America, so had the office of master been recognized as an integral part of the administration of that relief and had become soundly rooted in the legal thinking and custom. It was from this basis that after the Revolution the office of master in chancery or its equivalent made its way into many of the state and federal systems of procedure.

28. 10 Hening, op. cit. supra note 5, at 320.
29. 10 Hening, op. cit. supra note 5.
30. 2 Hawkes, *The History of North Carolina*, page 203.
31. 2 Wilson, op. cit. supra note 9 at 779.
32. Bergzon, "Masters in Chancery", 8 Law Society Jour. 616 (1938-39).
33. Grinnell op. cit. supra note 10 at 56 et seq.
34. 3 *Colonial Records of Connecticut* 413. See 2 Wilson, op. cit. supra note 9 at 791.
35. Rawle, op. cit. supra note 13, appendix pages 16, 21, 24, 28, 35, 36 and 44.
36. *Ibid.*, at 38, 46.
37. 11 Hening op. cit. supra note 5 at 389.
38. 12 Hening, at 766.

Legal Education of the Future

By Arthur A. Ballantine • of the New York Bar (New York City)

■ In his invaluable *Legal Education in the United States,* so well reviewed by Arthur T. Vanderbilt in the November issue of the JOURNAL, Dean Harno most effectively and readably sets forth the history of legal education in the United States. Dean Harno says: "There is today a substantial measure of activity and ferment in the law schools." I regret that Dean Harno did not regard it as within his province to suggest what might be the outcome of this ferment and come to be legal education of the future.

As one following legal education with much interest, I attempted to make some suggestions in this field and put these suggestions in an article "Presenting the Law: A Different Approach", which appeared in the March, 1953, issue of the *Journal of Legal Education.*

My idea is in essence that the law schools get away from the presentation of the law as a series of almost watertight compartments—a method of treatment adhered to ever since the great innovation of the case system of teaching. I would have them use new subjects, such as:

I. The Law—what the law is, how it has developed.
II. The Facts—how facts are to be ascertained and developed.
III. Documents.
IV. Statutes.
V. Persons who can invoke the law.
VI. Invoking the law.
VII. Public law.

I ventured to call my suggestion to the attention of the great master of legal education, Professor Roscoe Pound, and received from him a letter as follows, which I have Dean Pound's consent to publish:

> I am much obliged by your sending me your comments "Presenting the Law: A Different Approach". There is much said and written nowadays about changed law school curricula and about the whole subject of presenting the law to the student of today. I taught law from 1899 to the end of January 1953, and have seen a good deal of change in that time. There are few things of which I am certain, but of one thing I am, namely, that the key to legal education is in the first year in the law school. Thorough presentation of a few fundamental subjects, contracts, torts, property, procedure, and I should say criminal law (although that is not the fashionable way of looking at the latter today) will enable students to go forward with assurance of becoming competent lawyers. As to what is built upon this foundation there is room for a great deal of difference and I am not thoroughly assured. I do feel, however, that there is too much tendency to throw into the law school curriculum general information which ought to belong in the preliminary general education. In that respect I am in accord, if we are going to depart from the traditional legal curriculum here, with the outline you sent me. All of what you lay out there has to do immediately with the law itself rather than with general economics, politics and social science.
>
> It is quite impossible for a law school within the compass of the reasonable time which a student can devote to his professional education to cover everything which it is desirable for a lawyer to know. But in the past those who have mastered the work here thoroughly have certainly been able to go very far and I suspect that thoroughness is much more important than the detailed contents of the curriculum.

To Dean Pound's letter I replied as follows:

> Thank you very much for your letter written after I took the liberty of sending you as the master of instruction in law my comments "Presenting the Law: A Different Approach". I appreciate your finding that even though "there is much said and written nowadays about changed law school curricula" what I have to say has to do immediately with the law itself.
>
> As a student who had to use his law in practice I thoroughly agree with your conclusion that the key to legal education is the first year in the law school. However, I venture to disagree with your suggestion that a "thorough presentation of a few fundamental subjects, contracts, torts, property, procedure" will suffice. Possibly my difference will be eliminated if I knew just what you mean to include in the "thorough presentation". If by that presentation you would include substantially the material I advocate (i.e. what the law is, how to deal with facts, statutes, and to invoke the law at various stages) probably I would find myself in accord with you.
>
> My conviction is that the teaching in the first year of the subjects you name as actually carried on in the law schools of my time was by no means sufficient for the creation of the rounded lawyer. To my mind it is no answer to say that "those who have mastered the work here thoroughly have certainly been able to go very far". Those who mastered the work there include many men of exceptional ability who like the lawyers of early days would have gone far without any law school training at all.
>
> To my mind the question now is how can we make the law schools of

maximum help to students in all respects. I do not think that this maximum help will be achieved until there is much change in the detailed contents of the curriculum.

Your letter furthers the discussion of the subject which I had hoped to encourage and I shall be grateful to you if you will permit me to offer for publication your letter and this reply.

To that I received a reply from Dean Pound as follows:

As to your publishing my letter of March 31 in answer to yours of March 25 along with your reply, I had not intended when I dictated my letter to have it part of a debate. Perhaps if I did I could have expressed myself more fully and satisfactorily. But if you think it worth while to publish that offhand letter as I dictated it I will leave it to your judgment.

I do think that to save themselves and to perform their full duty to the profession and the public the law schools should promptly take steps to modernize.

Some Notes on the Chief Justice

by Albert P. Blaustein • of the New York Bar (New York City)

■ When the United States Senate confirmed President Eisenhower's first major judicial appointment, it put its stamp of approval on the fourteenth Chief Justice, the eighty-eighth justice, the thirty-seventh Republican and the third Californian to take his seat on the United States Supreme Court.

Chief Justice Earl Warren now joins twelve of his thirteen predecessors in seeing his presidential appointment confirmed by the Senate. The exception was South Carolina's John Rutledge, who received a recess appointment as second Chief Justice by President Washington in 1795 and whose nomination was rejected by the Senate less than six months later.

President Eisenhower, the nation's thirty-third chief executive, is also the thirtieth President to make a Supreme Court appointment. The exceptions: William Henry Harrison, Zachary Taylor and Andrew Johnson. Washington appointed the greatest number, ten, while Franklin D. Roosevelt named nine. Andrew Jackson appointed seven Justices, William Howard Taft, six, and Abraham Lincoln, five.

Lincoln's appointment of Californian Stephen J. Field in 1863 resulted in the only ten-man Supreme Court in United States history. The original Court had only six Justices; Thomas Jefferson raised the number to seven and Martin Van Buren added the eighth and ninth members. The number has remained at nine since the Lincoln administration.

In addition to Chief Justice Warren and Associate Justice Field, California has been represented on the High Court by Joseph McKenna, designated by President William McKinley in 1898. Justices have been selected from only twenty-eight states. New York leads the list with eleven appointees, followed by Massachusetts and Ohio with eight, Pennsylvania with seven and Kentucky with six. There have been five justices from Tennessee, four each from Maryland and Virginia, and three each from Connecticut, Georgia, New Jersey, South Carolina and, of course, California. Alabama, Illinois, Iowa, Michigan and North Carolina have each been represented by two High Court appointees and Indiana, Kansas, Louisiana, Maine, Minnesota, Mississippi, New Hampshire, Texas, Utah and Wyoming by one.

Warren, however, is the first Chief Justice from California. Three New Yorkers and three Ohioans have held that post, plus one each from Connecticut, Illinois, Kentucky, Louisiana, Maryland, South Carolina and Virginia.

Appointment of the new Chief Justice—three-time Republican governor and 1944 Republican vice presidential candidate—also evens the Supreme Court political scoreboard. Warren is the thirty-seventh member of the G.O.P. among the eighty-eight justices, joining the ranks of thirty-seven Democrats, thirteen Federalists and one Whig. But Warren is only the second Republican on the present Court. The other: Associate Justice Harold H. Burton, of Ohio.

Only three of Chief Justice Warren's predecessors have had previous service as Associate Justices of the Supreme Court. Two of them, Edward D. White, of Louisiana, and Harlan F. Stone, of New York, received "promotions" from Associate Justice to Chief. The third veteran was Charles Evans Hughes, of New York, who served as Associate Justice from 1910 to 1916 when he resigned to run for President against Woodrow Wilson. President Herbert Hoover named Hughes Chief Justice in 1930.

There were two other Chief Justices who had been previously designated as Associate Justices but who never served in the latter post. John Rutledge, the second Chief Justice, resigned his appointment as Associate Justice in 1789 before taking his oath of office. And Roger B. Taney, of Maryland, the fifth Chief Justice, was nominated for the Court in 1835, but the Senate adjourned without confirming the appointment.

Sixty-two-year-old Warren is one of the oldest appointees ever selected for the High Court. Older Chief Justices at the time of their nomination were Stone, who was 69, Hughes, 68, and Taft, 64. Stone and Hughes, however, had already served as Associate Justices appointed at a much younger age and Taft was then an ex-President. The oldest man ever appointed directly to the High Court was 68-year-old Joseph Bradley, of New Jersey, designated by President Grant in 1870. Age, however, was certainly no drawback to the appointment for Bradley continued in office for twenty-two years.

John Jay, of New York, was only 44 when he became the nation's first Chief Justice and John Marshall, of Virginia, was only 46 when he was named fourth Chief Justice. Three of the Associate Justices were even younger when they took their seats on the High Court. Joseph Story of Massachusetts, was 32, William Johnson, of South Carolina, was 33 and Bushrod Washington, of Pennsylvania, was 36 when named to the bench.

Statistically speaking, Chief Justice Warren has not only assumed an honored post, but one which he can expect to hold for a good many years. True, John Rutledge was Chief Justice for less than six months and Associate Justice James F. Byrnes, of South Carolina, served for only fifteen months. But longevity appears to be the rule of the High Tribunal. Story was in office thirty-four years and ten months; Field, thirty-four years and nine months; and Marshall, thirty-four years and six months. John M. Harlan, of Kentucky, served thirty-three years; James M. Wayne, of Georgia, and John McLean, of Ohio, each served thirty-two years; Bushrod Washington was a member of the Court for thirty-one years; and both William Johnson and Oliver Wendell Holmes, of Massachusetts, were Associate Justices for thirty years.

A Surrejoinder to Judge Jayne

Kenneth D. Hawkins • of the Illinois Bar (Chicago)

■ I have read with interest the article by Maxine Virtue entitled "Sweet Are the Uses of Discovery", appearing in the April issue of the AMERICAN BAR ASSOCIATION JOURNAL, together with Judge Ira W. Jaynes' article "Discovery: The New Michigan Rule", intended as replies to my address published in the December issue.

With due respect to Mrs. Virtue, she has raised her sights too high, overshot the target and clearly misapprehended what I wrote. Mrs. Virtue evidently believes the Federal Rules and their authors should under no circumstances be criticized. Her theme seems to be "the gods have spoken and we must revere the gods".

My article was not intended as a broadside criticism of all the Rules. The objections were confined to Rule 34 and its concomitants. This is conclusively shown in the second paragraph wherein I stated:

> Let me say at the outset, I agree with most of the Federal Rules of Civil Procedure. In general, they are an improvement on the old common law form of pleading and practice. But I do object to Rule 34. I think this Rule should be scrapped.

I stand by that statement. Judging from the many letters trial lawyers throughout the United States have written me, I do not stand alone.

Wigmore on Evidence, third edition, paragraphs 1259, also supports me. In commenting on *The Queen's Case* (2 B. & B. 286) which held that before a witness could be cross-examined on the contents of a letter he must first be permitted to examine the letter, Professor Wigmore says:

> The English decision laid down a rule which for unsoundness of principle, impropriety of policy, and practical inconvenience in trials, committed the most notable mistake that can be found among the rulings upon the present subject.

This decision was so erroneous and raised such a furor that it was soon overruled by statute. Rule 34 by compelling an attorney to disclose the contents of his file to an opponent in advance of trial, seeks to restore *The Queen's Case* in more violent form. Mr. Justice Jackson got at the meat of the coconut in the case of *Hickman* v. *Taylor*, 329 U. S. 497, wherein he said:

> A common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions *either without wits or on wits borrowed from the adversary.* [Italics supplied.]

With reference to your article on "Discovery", it is refreshing to learn that Michigan Rule 35 has worked well during the last twenty-one months. I hope the same may be true twenty-one years hence.

I note, however, that you have deleted parts of your Rule 35. You state you have done this "in the interest of saving space and confusion". Is not this statement a confession of poor draftsmanship? One of my criticisms of Federal Rule 34 was poor draftsmanship.

You then go on to say that Michigan Rule 35 differs materially from Federal Rule 34 which specifically incorporates Rule 26 (b). Rule 26 (b) states:

> . . . It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought ap-

> pears reasonably calculated to lead to the discovery of admissible evidence.

This diabolical provision is omitted under your Rule 35, and rightly so. Your new Rule insists that the examination be confined to testimony which would be "admissible under the rules of evidence governing trials". If Federal Rule 34 is perfect, why, may I ask, did the Michigan Supreme Court impose the limitation? Instead of answering my objection to Federal Rule 34, haven't you adopted it?

May I be so bold as to suggest that the Supreme Court of Michigan would have done much better had it enlarged its Rule 35 even further and followed Illinois Rule 17 or the English Rule which provides that communications between a solicitor and his client or a third party, or documents obtained by a solicitor for the purpose of prosecuting or defending existing or contemplated litigation, or which are prepared confidentially for the purpose of obtaining information, evidence or legal advice, *are privileged*.

As you no doubt know, the Connecticut Bar has been greatly exercised for several months on whether or not it should adopt in its state courts the practice and procedure followed in the federal courts. The March, 1954, issue of the *Connecticut Bar Journal* is devoted entirely to this subject. At page 46, Mr. Morris Tyler, the Chairman, states that the State Bar Committee recommended that there should be added to Rule 30(b) of the Federal Rule the following:;

> This Court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor or agent in anticipation of litigation or in preparation for trial, unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claims or defense or will cause him undue hardship or injustice. The Court shall not order the production or inspection of any part of a writing that reflects an attorney's mental impressions, conclusions, or opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert.

The Chairman goes on to say that "the purpose of this addition was to eliminate the conflict which had arisen under the Federal Rule over what type of material was 'privileged' within the meaning of Rule 26".

It must be obvious, therefore, that the radical provisions of Rule 34 and the Rules it incorporates by reference are gradually being whittled away. In speaking of radical ideas, theories and ideologies, Mr. Justice Holmes wrote nearly thirty years ago:

> With effervescing opinions, as with champagne, the quickest way to let them get flat is to let them get exposed to the air.

I submit the same applies to Rule 34.

You refer to the very recent divorce case of *Tomlinson* v. *Tomlinson*, 338 Mich. 274. I fail to see how this decision advances in the slightest degree the argument in favor of discovery, except as to its constitutionality. Marriage, of course, creates a status in which, not only the spouses, but the state has an interest. Marriage can be dissolved only by death or in accordance with the statutes. Statutes usually provide for alimony so as to protect the innocent spouse. In order to award alimony sufficient to enable the wife to live in that station in life to which she has been accustomed, the court grants counsel the right to inquire into the assets of the erring spouse. This was true long before the present Rules of Discovery were conceived.

This right, however, has never been granted to an adversary in a negligence case. Negligence cases constitute probably 85 per cent of present-day litigation. Liability for negligence is not based on wealth. To make a defendant pay heavier damages simply because he is rich is contrary to every rule of the common law. A rich defendant is and should be entitled to the same fair trial as a poor defendant. Damages are based on injuries inflicted, not on one's financial standing. Certainly you would not carry over the decision in the *Tomlinson* case to damage suits.

What I have said may not appeal to the so-called office lawyer or to those whose activities are confined to the academic field, but it will appeal to trial lawyers who daily deal with the practical aspects of litigation.

$10,000 Sloan Gift Will Aid Citizenship Project

■ The Alfred P. Sloan Foundation, Inc., of New York, has made a $10,000 grant to launch the American Bar Foundation's research project on citizenship. The grant will be applied specifically to the preparation of a source book entitled *Encyclopedia of Freedoms*. It is to be one of the early projects of the American Bar Research Center.

President Jameson hailed the gift as making possible "an important contribution to the field of citizenship training". Harold J. Gallagher of New York, former Association President, is Chairman of the Special Gifts Committee of the American Bar Foundation, which arranged for the grant with Sloan Foundation officials.

The contemplated *Encyclopedia of Freedoms* will be a source work covering the historical background of the U.S. Constitution and the Bill of Rights. Currently under way are two other major studies made possible by large foundation gifts. One concerns individual rights as affected by national security and is being carried on by the special committee bearing that name headed by Whitney North Seymour of New York. That research project is supported by a $50,000 grant from the Fund for the Republic. The Ford Foundation similarly made $50,000 available to the Special Committee on the Administration of Criminal Justice, headed by Associate Justice Robert H. Jackson of the Supreme Court.

Elevating the Role of the Informer:

The Value of Secret Information

by M. William Krasilovsky • of the New York Bar (New York City)

■ There is a general dislike of informers in our society. From the "tattle-tale" in grammar school to the "stool pigeon" graduate of Alcatraz and Sing Sing, the informer is disliked and distrusted. Mr. Krasilovsky argues that this is unfortunate and that informers play a vital role in our efforts to combat crime and preserve our national security.

■ Public disdain for the role of informer has long been predominant. Strongly rooted in our customs, imbued from childhood, is the social rejection of the snitcher. "I'll punish John for taking the candy, but I'll punish you doubly for telling on him" is familiar to us all. The adult informer of criminal or disloyal behavior usually is equally rejected, but the childhood world, where one must choose his side as either with the cops or the robbers, points up the adult passivity in the war on crime. The mass of Americans sit passively in a neutral group and leave crime detection to the professionals. We reserve our plaudits for the professional who uncovers crime, be he policeman or district attorney, but let not the volunteer informer seek acclaim, for he is no more than a meddler.

The problem of public acceptance of the informer has been illustrated by two recent events standing in striking juxtaposition. The United States Senate voted to pay a reward of over $16,000 to an informer whose tip resulted in the conviction of a major gold smuggler, and in the same week, a story of prison life was published by one whose refusal to be an informer under congressional subpoena resulted in her sentence to prison for contempt. The financial reward to the informer and the punishment of the recalcitrant witness is playing an ever-increasing role in American life warranting the growing attention.

Justice Douglas has sounded a warning against "a growing underground of informers" operating in secrecy and with anonymity, and providing hazard not only to the accused individual but to all the country. His criticism, aimed more at the use of low quality information than at those who supply it, reads as follows:

> . . . the cloak of anonymity is thrown over a growing underground of informers. As that secrecy mounts, the reliability of the information obtained must necessarily decline. One who is not put to the test of an oath; who need not face his victim with the charge, one who need not suffer the torment of cross examination, can become quick and restless with his accusations. The consequences are not only disastrous to the individual; they reflect upon the tribunal which administers the system.[1]

A contrary view of the value of secret sources of information, particularly as regards the application of such informer assistance to the New York Parole Board, was expressed in a recent opinion. Justice Isadore Bookstein, of the New York Supreme Court, ruling on an application to order the Parole Board to divulge the names of intercedents on behalf of a convict seeking parole, stated:

> It should be obvious to all that the impartial and intelligent discharge of their duties by the Board of Parole —requires it to obtain information which in many instances it can only obtain upon the assurances that such information is confidential. The entire penal and parole system would surely be jeopardized by violating such a well established principle.[2]

The role of informer is assumed for greatly variant purposes ranging from a sense of civic responsibility to a calculated expectation of reward. Arnold Schuster, who pointed out Willy Sutton, is an example of the altruistic informer, while Anna Sage, who informed the F.B.I. of Dillinger's whereabouts, is reported to have

1. Address to the American Law Institute, May 20, 1953.
2. *The New York Times*, October 30, 1953, page 1.

done so only after her own arrest and in return for promise of no prosecution.[3]

High among the financial reward seekers stands the man who sued the Government for $199,800 for supplying information on a specific major tax evasion, claiming unsuccessfully that this sum was his reward as of right. The informer group includes many disgruntled persons who were related to the accused by employment, marriage, partnership or romance. The motive of such disgruntled persons is often so strong that the information is colored. Criminal collaborators of the accused are frequently found in the role of informer once they are arrested, assuming this role only as a means of bargaining for favorable treatment. Such bargaining continues even to the postsentence date, with reliability decreasing as desperation increases. The inclination to add fiction to fact, or to seek revenge, plus general unwillingness to be cross-examined, provokes much of the public censure of the role of the informer. The poor reputation of so many of the individual informers is a proper ground for impeaching his story, but too often an emphasis on *argumentum ad hominem* results in irrelevancies. On the other hand, many are the overzealous prosecutors who will recommend sentence severity beyond the deserts of the crime involved simply because of an unwillingness of the defendant to incriminate others.

Failure To Inform May Be Misprision of Felony

Few of the many who deprecate the position of the informer in society recognize that he who fails to inform of a known felony commits a crime himself. One cynical critic of the role of informer said of those who "always symbolized the decadence of society":[4]

> Clearly if the government wants to make sure of our loyalty by paying our neighbors to spy on us, a drastic change is needed in the conditions of employment. I suggest that Congress pass a bill making everybody a spy.

Little did the critic know that provision exists in the statutes of the United States that makes it a crime to fail to disclose his "knowledge of the actual commission of a felony cognizable by a court of the U. S."[5] Would not enforcement of this provision, with its punishment of $500 fine or up to three years imprisonment or both, elevate the role of informer by encouraging nonmercenaries to come forward with evidence?

False Informers Are Subject to Penalty

In June of 1952, the State Department restricted the passport of Owen Lattimore on the basis of a report that Mr. Lattimore was about to leave the country on a journey behind the Iron Curtain. The report had originated with a Seattle, Washington, travel agent who communicated it to a federal officer. Before long it was discovered that there was no truth to the report and that the informant had no grounds for belief in its reliability and, in fact, had passed on the story knowing of its fictional nature. An indictment was secured against the false informer, based upon a rarely used criminal statute regarding wilfully supplying false information to a federal officer.[6] This statute is equally available as to falsification "in any matter within the jurisdiction of any department or agency of the United States". Unfortunately, the full deterrent effect of this statute has not been felt, especially due to the jury's acquittal of the false informant in the Lattimore case, apparently accepting his defense that the report was given under a state of intoxication.[7]

On October 25, 1953, the Federal Bureau of Investigation announced that a charge of falsely informing federal agents had been filed in regard to the Greenlease kidnapping case.[8] Further details are yet to be released, but the wide-scale public interest in this case makes the deterrent possibilities of this prosecution for furnishing false and misleading information of major value. It is easy to believe that a program of well-publicized, firm enforcement of this statute would materially elevate the character of informer assistance by a purge of the malicious and mischievous.

Statutory Rewards to Informers

We have many statutes that encourage the assumption of the role of informer by offer of financial reward. The Commissioner of Internal Revenue is authorized to grant rewards in his discretion as a result of information given on tax fraud.[9] The Commissioner of Narcotics is authorized to grant "appropriate" rewards for information regarding any violation of narcotics law. In addition to such reward, the informer is entitled as a matter of right to one half of the fine recovered, which can amount to an additional reward of $2500 for each offense for which the maximum fine is given.[10] In the already noted recent gold smuggling case, the informer received a statutory reward of $1000 from the Commissioner of Customs[11] before the Senate move to increase the reward in this specific case to 10 per cent of the amount recovered.

Perhaps the least attractive of informer reward statutes on the federal books is that regarding the carrying of illegal-size sheath knives by seamen. One half of the fine of $50 goes to the informer and the remainder goes to the Seamen's Sickness and Benefit Fund. Another incidental reward statute relates to wildcat petroleum production where the producer fails to file a special tax return. The reward is 50 per cent of a penalty starting at $500 and increasing daily at the rate of $50 a day.

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3. *Collier's*, June 25, 1949, page 29, William J. Slocum, "Sing, Pigeon, Sing".
4. *The Nation*, "The Observer", April 8, 1950, page 318.
5. 18 U.S.C.A. 4.
6. 18 U.S.C.A 1001.
7. *The New York Times*, October 3, 1952, page 8, column 8.
8. *The New York Herald Tribune*, October 26, 1953.
9. 21 U.S.C.A. 3792.
10. 26 U.S.C.A. 199.
11. 19 U.S.C.A. 1619.

Prosecution by Informers, the Qui Tam Action

The lawyer encounters a unique facet of the role of the informer when he is asked to bring a *qui tam* action. Such an action enables the aggressive informant to institute proceedings on behalf of the United States against any nonmilitary person who has defrauded the Government.[12] The prospective reward from such an action can, at maximum, be one fourth of the recovery of double damages plus $2000 in addition to reasonable costs. The risk involved is that the unsuccessful prosecutor is responsible for all costs imposed by the court.

One of the best explanations of the purposes of the *qui tam* statute is found in an 1885 decision.[13] The opinion states:

> . . . the theory [is] based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow public vessel.

The private prosecutor in a *qui tam* proceeding need not consult with the government prior to instituting his action. He must, however, not base his action on evidence or information already in the hands of the Government and, once the suit is instituted, must make full disclosure of evidence and information with notice of pendency. Upon receipt of this notice of pendency, the Government has sixty days in which to move to continue the prosecution on its own behalf, thereby limiting the possible recovery to the informer to a maximum of one tenth of the recovery. The statute speaks not in terms of reward, as do other informer statutes, but of "fair and reasonable compensation" with discretion in the trial judge.

Honor among thieves has received social acceptance to the point where citizens at large feel admiration for the tight-lipped criminal and disdain for the stool pigeon. Many of those who sincerely decry the role of informer reach their conclusion in honest condemnation of the breach of confidence that is invariably involved. They fail to look beyond their appreciation of the honor of maintaining confidences involved in their own world of honest endeavor to realize that the nature of the confidence to be honored must be examined.

It most certainly is compelling a breach of confidence to require a witness to name fellow members of the Communist Party. Is the nature of the confidence such that it deserves protection? Our courts have long recognized several confidential relationships even to the point of refusing to hear testimony that would breach that confidence. The priest may not, even of his voluntary accord, testify as to what was said in the confessional booth by the penitent. The attorney may not reveal information supplied by his client in the course of his confidential professional relationship. The wife may not reveal information furnished by her husband in confidences exchanged between the two. The doctor must keep silent as to information furnished by his patient in the course of medical treatment.

The various protected relationships have been deemed important enough to preserve even at the expense of barring testimony that could aid in the administration of justice. The privilege arising out of marriage status, or religious, medical or legal consultation is not equally available to other confidential relationships. Even the socially approved confidences of the journalist and his quoted source or accountant and client are not equally protected. It is simply that in balancing the social values, the preservation of such relationships has not been considered important enough to outweigh the resultant weakening of the administration of justice. Let those who impugn the breach of confidence involved in disloyalty proceedings weigh the relative values involved, but let not those who receive such confidential information involving a person's reputation carelessly publicize unsifted and unevaluated material, thereby reducing the greater value of protecting our country's security.

M. William Krasilovsky is a graduate of Cornell University (1947) and the Cornell Law School (1949). He served as clerk to the federal district judge at Juneau, Alaska, and subsequently practiced in that northern territory. He is now with a firm in New York City.

Machiavelli's Views on Informers a Modern Guide

How to elevate the credibility of informers and lessen the onus on the informer who acts other than through mischief or malice is not a new question. It was well considered as far back as the early sixteenth century by Niccolo Machiavelli, who can hardly be called an impractical idealist in his political observations. He wrote, in *The Discourses*,[14] what could well be used today as an appeal for use of the available prosecution statute against maliciously false informers, and for a socially approved reception for information. His statement reads:

> Of one it was reported that he had

12. 31 U.S.C.A. 232.
13. *U.S. v. Griswold*, D.C. Oregon 1885, 24 Fed. 361, *affd.* 1887, 30 Fed. 762.
14. *The Prince and The Discourses*, Machiavelli, Modern Library Edition, page 134.

robbed the public treasury; of another that he had failed in such or such an enterprise because he had been bribed; and of a third, that he had caused this or that public inconvenience for the purpose of serving his own ambition. This gave rise in every direction to hatreds amongst the citizens, whence divisions arose, and from these sprung factions that proved the ruin of the state. . . .

He stated his solution as being:

Now there is no more effective way to put an end to calumnies than to introduce the system of legal accusations, which will be as beneficial to republics as calumnies are injurious. On the other hand, there is this difference, namely, that calumnies require neither witnesses, nor confrontings, nor any particulars to prove them, so that every citizen may be calumniated by another, while accusations cannot be lodged against anyone without being accompanied by positive proofs and circumstances that demonstrate the truth of the accusations. Accusations must be brought before the magistrates or the people, or the councils, whilst calumnies are spread in public places as well as in private dwellings: and calumnies are more practiced where the system of accusations does not exist, and in cities the constitutions of which do not admit of them. The lawgiver of a republic, therefore, should give every citizen the right to accuse another citizen without fear or suspicion; and this being done, and properly carried out, he should severely punish calumniators, who would have no right to complain of such punishment, it being open to them to bring charges against those whom they had in private calumniated. And where this system is not well established there will always be great disorders. . . .

American Law Student Association

■ Lawyers who will be in Chicago for the Annual Meeting of the American Bar Association during August are invited to attend several feature events of the American Law Student Association program which will be held at the Sheraton Hotel.

Of particular interest is the Institute of Civil Jury Trial Techniques, which will be presented by the Minnesota State Bar Association on August 17. This is a practical, colorful and exciting demonstration of all phases of civil jury trial techniques which has been presented before packed houses at bar meetings in various parts of the country. The institute will be discontinued after the performance in Chicago, so that is the last opportunity lawyers will have to see it.

Participants in the program, all from Minnesota, are as follows: *Moderator,* William W. Gibson, Minneapolis, Chairman, Public Relations Committee of Minnesota State Bar Association and State Delegate to the House of Delegates; *Presiding Judge,* Gustavus Loevinger, St. Paul, District Judge, Ramsey County, Minnesota; *for the Plaintiff,* Clifford W. Gardner, St. Paul, former President of the Minnesota State Bar Association; *for the Defendant,* Sidney P. Gislason, New Ulm, Vice President of the Minnesota State Bar Association.

The Institute embraces the following subjects: the lawyer's work before suit is started, including discussion of pleadings, efforts to effect settlements, interviewing witnesses and other preparatory techniques; impaneling the jury; opening statements; presenting the evidence; objections to evidence; trial practices; the expert witness; relations to the trial judge; instructions to juries; the verdict; some general questions; and the conclusion, which is handled by Judge Loevinger.

According to Judge Loevinger, "The Institute places particular emphasis on the relation of the lawyer to his client, the opposing lawyer, the judge, the jury, and the witnesses. It is interested in techniques of the complex human relations involved in the trial field rather than in substantive law or remedial law."

Another feature which will interest lawyers is the Legal Film Program, which will be presented on the evening of August 16 several hours before the American Bar Association President's Reception. Through the courtesy of the Columbia Broadcasting System the film shown will include a kinescope of the famous Edward R. Murrow show, *The Radulovich Story.* Mr. Murrow received the 1954 television reporting award of the Sidney Hillman Foundation for this telecast, which dealt with the case of an Air Force reservist who was dropped from the service for "guilt by association".

Arrangements also are being made to include at least one of several films on the law of evidence. These are believed to be the only movies in existence which deal with substantive law. They were produced by the Navy to educate its lawyers who try cases before the military courts, which follow the same rules of evidence that are used in civilian courts.

Public relations problems of the Bar will be considered at the annual American Law Student Association Luncheon. Lawyers also are welcome to attend this event, which will take place at the Sheraton Hotel on August 17, prior to the Institute of Civil Jury Trial Techniques. The speaker will be Don Hyndman, Executive Assistant to the Public Relations Committee of the American Bar Association.

Thirty-First Annual Meeting—

The American Law Institute

by Thomas N. O'Neill, Jr.

■ The thirty-first annual meeting of The American Law Institute was held at the Mayflower Hotel in Washington, D. C., from May 19 to 22. Approximately 650 of the Institute's 1200 members attended.

The opening session was addressed by the Chief Justice of the United States, who summarized statistics on the time required for cases to proceed to trial or oral argument in federal courts. The Chief Justice emphasized that congestion in some areas is penalizing poor litigants and called for a careful study of the problem. At this same session progress reports were delivered by the officers of the Institute and by the Director of the Committee on Continuing Legal Education.

The chief subjects of discussion at this year's meeting were two model codes, previous drafts of which were studied at the 1953 sessions. Discussion of the Model Penal Code was led by the Chief Reporter, Professor Herbert Wechsler, and the Associate Reporters, Judge Morris Ploscowe and Professor Louis B. Schwartz, plus Dr. Paul W. Tappan, formerly an Associate Reporter and now Chairman of the Federal Parole Board. Professor Stanley S. Surrey, Chief Reporter, and Dean William C. Warren, Associate Chief Reporter, presided over consideration of the Institute's Federal Income, Estate and Gift Tax Statute. While no final approval was given either project, considerable progress was made on the tentative drafts which were submitted to the Institute.

The provisions of the Penal Code relating to sentencing and treatment of offenders attracted considerable attention. The Code delineates in detail criteria for imposing or withholding sentence, but the final responsibility in each case continues to reside in the courts. This decision was approved by the members, many of whom felt that boards or other administrative bodies are too much subject to public pressures to be vested with the function of sentencing. Considerable criticism was, however, leveled at the Code's classification of offenses—felony (in three degrees), misdemeanor, petty misdemeanor, and a new offense—violation—which does not constitute a crime. Consecutive sentences, sentence for an extended term and suspension of sentence were also discussed. The second important part of the Code considered was that dealing with the crime of "theft", a consolidation of the heretofore distinct property offenses of larceny, embezzlement, false pretenses, extortion, and receiving stolen property.

Work on the Penal Code began only two years ago after a grant from the Rockefeller Foundation. Unlike the Restatement, it will not necessarily reflect the existing law of crimes; rather it is intended, as its title indicates, to be a uniform statute which may make major alterations in controversial areas and create a cohesive nation-wide system of criminal law.

This year's study of the Federal Income, Estate and Gift Tax Statute centered upon gift and estate tax provisions. Proposed deductions for gifts made to provide medical care and education were approved, but a deduction for gifts made as support for the donor's relatives was deleted. Intra-family transactions and corporate gifts were also studied. One of the most disputed sections was the estate tax provision for an irrebuttable presumption that gifts made within three years of the transferor's death are made in contemplation of death. This provision was deleted by the membership, as was an alternative extending the present rebuttable presumption period from three to five years. Transfers taking effect at death and joint tenancies were also among the subjects studied.

The Tax Statute has been made possible by generous grants from The Maurice and Laura Falk Foundation of Pittsburgh. It was undertaken by the Institute in response to a growing demand by the profession for a code which will eliminate conflicts

and contradictions in the present law. However, it is not designed to deal with tax rates, which are believed to be a political problem.

Another major topic was the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws, with the Institute's Model Code of Evidence as a basis. The Rules differ substantially from the Code on some matters, chiefly in the areas of hearsay and presumption, and to a lesser degree, on the lawyer-client privilege. Nevertheless, Professor Edmund Morgan, Reporter for the Model Code, recommended approval of the Rules. His recommendation was followed by the Institute, with the understanding that its action in no way reversed its prior approval of the Model Code of Evidence.

At the 1953 meeting, the Council of the Institute announced the commencement of a new project, called the Restatement Continued, funds for which were donated by The A. W. Mellon Educational and Charitable Trust of Pittsburgh. This revision is designed to conform the Restatement to legal developments since its publication. In furtherance of the program tentative drafts of the Restatements of Agency and Conflict of Laws were discussed by Professors Warren Seavey (Agency) and Willis Reese (Conflicts), the Reporters. Domicile was the chief object of scrutiny in the conflicts sessions. Criticism was particularly directed against a comment indicating that the location of domicile may differ depending on the precise issue or purpose involved. Many members felt that language to be a contradiction of the black-letter rule that a person can have but one domicile. However, the comment was retained. In addition, objection was made to the Reporter's recognition of desire to acquire domicile as a factor helping to determine domicile in close cases. This comment was also retained.

In the agency sessions, discussion centered chiefly on the definition of "subservant" and on the section dealing with liability when an agent of two persons conducts what purports to be a transaction between them and thereby embezzles from one of them. Apportionment of the loss between the principals was suggested, but the Institute reached no final solution of the problem.

One of the feature attractions of the sessions this year was a symposium on "Crime and Punishment—American Style", over which Judge Herbert F. Goodrich, Director of the Institute, presided. Dean Albert J. Harno, of the University of Illinois Law School, emphasized the lack of criminal statistics and called for studies in that area. Professor Herbert Wechsler summarized the substantive provisions of the Model Penal Code. After-sentence procedure was described by James V. Bennett, Director of Federal Prisons, who pledged fullest use of the new Federal Youth Act, which is based on the Institute's Federal Youth Correction Act. Finally, Judge Gerald F. Flood, of Philadelphia, discussed the criteria for sentencing and stressed the importance and need of statistics on recidivism.

Harrison Tweed, President of the Institute, presided over the annual dinner on May 21. At that time, the Institute was addressed by Sir Roger Makins, K.C.B., K.C.M.G., Her Britannic Majesty's Ambassador; author Catherine Drinker Bowen; and H. Struve Hensel, Assistant Secretary of Defense. Sir Roger discussed the effects of the common law as a binding force between his nation and the United States. Taking leaves from her published books and one now in progress, Mrs. Bowen compared Justice Holmes, John Adams, and Sir Edward Coke. Mr. Hensel spoke on tariff policies and called for elimination of trade barriers except those necessary to protect industries essential to national defense.

The officers of the Institute were re-elected for another term. They are Harrison Tweed, of New York, *President;* William A. Schnader, of Philadelphia, *First Vice President;* John G. Buchanan, of Pittsburgh, *Second Vice President;* Earl G. Harrison, of Philadelphia, *Treasurer;* and Herbert F. Goodrich, of Philadelphia, *Secretary and Director.*

International Congress of Comparative Law

■ The Fourth International Congress of Comparative Law, under the auspices of the Académie Internationale de Droit Comparé, will be held at the Faculty of Law of the University of Paris from August 1 to August 7. Two hundred and sixty reports from jurists, law teachers and practicing lawyers from every part of the world will be submitted during the Congress. Dean Roscoe Pound is President of the Academy and will address the opening session.

Books for Lawyers

MASON'S MANUAL OF LEGISLATIVE PROCEDURE. *By Paul Mason. New York: McGraw-Hill Book Company, Inc. 1953. $6.50. Pages 640.*

If parliamentary law is mentioned, the average person at once thinks of *Robert's Rules of Order* or some similar work; on the other hand, few, except legislators, are familiar with *Jefferson's Manual.* In this difference lies the distinction between *Mason's Manual* and the usual work on parliamentary law. Stated in loosely mathematical terms, Mason is to Jefferson as the usual work is to Robert. Robert deals primarily with parliamentary procedure as applied to the ordinary organization such as a club, society, labor union or professional convention, while the *Manual* is confined to the rules and practices of legislative assemblies and is designed for those interested in a specialized field and possessing broader knowledge and experience in parliamentary law than is usually found in the average person. This work is a *vade mecum* for the neophyte as well as an authority for the initiated, and in a high degree combines simplicity of statement with accuracy of conclusion; all expressed in understandable terms and everyday language.

The present work discards picturesque but archaic terminology whose appropriateness, if ever existent, has long since been lost in the proverbial mists of time. The author employs modern expressions familiar to the average vocabulary, current in use and apt in description. One may read in ordinary language a simple statement of how a particular thing is done and why it is done that way. The improvement in terminology is illustrated by the substitution of the motion, "I move we vote immediately", for the outworn and often misunderstood, "I move the previous question".

Dealing, as it does, with legislative bodies, which are always representative in character and usually bicameral in composition, it discusses the rules applicable to such assemblies, and, among other specialized situations, communications between the two houses by means of messages. It also points out that, while legislatures are governed by constitutions, they themselves are the lawmaking authority under the constitution, and hence may pass any bill or suspend any rule, provided no constitutional impediment interferes. It is hard to reconcile this doctrine with Mr. Mason's statement (page 74) that "representatives in the legislature have only such authority as is delegated to them by the constitution". This quotation is at variance with the generally held conception that all powers inhere in the legislature, as the representative of the people, that are not expressly withdrawn from it by the state constitution or prohibited to it by the Federal Constitution. This contradiction illustrates the effect of political complexion upon parliamentary decisions. The presiding officer is a governmental figure as well as a moderator, and, at times political exigency may overbalance the scales of even-handed justice. This adds another uncertainty to an already complicated situation because every legislative body has the right, subject to constitutional limitations, to determine its own rules of pro edure which, except for constitutional violation, are not subject to judicial review.*

Apparent contradictions between the *Manual* and other works may be harmonized by close reading and thoroughly understanding the background. Thus, it is usually said that a second is necessary for most motions, while Mason says it is not. The reasons given in each work sustain the correctness of each conclusion. In the ordinary meeting the time of the members ought not to be wasted in discussing a proposition if only one person favors it; hence the necessity for a second to demonstrate that more than one member favors the proposal. On the other hand the legislative assembly is a representative body in which each member, as the representative of his constituents, has a right to place before the body any measure he deems advantageous to his constituents or desirable for the state at large. Seeming contradictory statements as to the vote required on some special motions such as "previous question" disappear when it is pointed out that a majority only is required in legislative bodies, while a two-thirds vote is necessary in other assemblies.

In conclusion, it may be said that the *Manual* is excellent and that in its own field it will do much to clarify and simplify a heretofore somewhat abstruse and frequently misunderstood subject. The author deserves the thanks of the legal profession for the result of his labor.

STUART B. CAMPBELL
Wytheville, Virginia

SUCCESSFUL APPELLATE TECHNIQUES. *By John Alan Appleman. Indianapolis: The Bobbs-Merrill Company. 1953. $17.50. Pages 1,081.*

This book is an attempt to present in readable form suggestions

* A reading of the case of *In re Sherill* rather than the headnotes discloses that this decision does not support Mr. Mason's conclusion, though the headnote to the case does. The actual decision of the Court was:

"But, if the Legislature under the assumption of an exercise of discretion does a thing which is a mere assumption of arbitrary power, and which, in view of the provisions of the Constitution, is beyond all reasonable controversy, a gross and deliberate violation of the plain intent of the Constitution, and a disregard of its spirit and the purpose for which express limitations are included therein, such act is not the exercise of discretion, but a reckless disregard of that discretion which is intended by the Constitution. Such exercise of arbitrary power is not by authority of the people. It is an assumption, and, *when it is claimed that an act is thus in violation of the Constitution,* a question of law is presented for the determination of this Court." (Italics supplied). *In re Sherill.*

which may be of assistance to all lawyers in more successfully prosecuting appeals.

The work, divided into three sections—the record on appeal, the brief on appeal, and oral argument on appeal—is intended to be of assistance to counsel regardless of where they practice. The author has attempted to present the entire problem of appellate work from the moment the judgment is rendered in the trial court to the date on which the final court of appeals renders its final decision.

In handling this very large and difficult subject the author has called to his assistance actual records, briefs and transcripts of oral argument from cases with which he is familiar. He has also called to his assistance a type of earthy wisdom which is all too rapidly disappearing from the profession.

The author hails from Urbana, Illinois, but he must also have trod the paths of Sangamon and the walks of Springfield, for he is endowed with a Lincolnesque style which enlivens his work and makes it thoroughly readable. The younger practitioner will find within this book that information which is necessary to a comprehensive understanding of the general problems involved in appellate work. The older practitioner will find within the covers of this book an opportunity to reminisce and "Monday morning quarterback" his own previous exploits, with some hope of improvement for the future.

Studded with sage advice, the book is a work from which all members of the profession who ever expect to appear before an appellate court may gain some advantage.

Speaking of the brief, Mr. Appleman says: "One must approach the court with frankness, as well. If a case presents a question of first impression, say so candidly, and say it immediately. Instead of reaching grotesquely for a wealth of attenuated authority, and reasoning by ill-chosen analogy, inform the court in the inception that, whatever its ruling may be, it is about to create new law in that jurisdiction. It will quicken the interest of the court. It will bring a certain excitement to those who have to paddle around with bare feet daily in the puddles of muddled precedent."

In speaking of the organization of the brief, Mr. Appleman says: "One should always, then, start with the point which is most acceptable to the court—as heretofore stated. At least, he should not open with a point which is going to engender resistance upon the part of the court. The horse which stumbles over the first hurdle will seldom finish the race."

In oral argument, the author urges brevity, clarity and equanimity. "One should not destroy clarity or persuasion, for the sake of brevity. But, in all cases, arguments should be stripped to the skeleton. Verbosity, pomposity, gushiness, repetitiveness, circumlocution—all of these are enemies of brevity, and they tend to destroy effectiveness, as well." "Adjectives and purple patches add little to the forcefulness of the argument. Rather, a clear exposition of the facts or law may demonstrate baldly a manifest absurdity or inequity, which the court will recognize more readily when it is not concealed in clouds of emotion."

His advice on the very difficult problem of distinguishing obnoxious cases is: "Wherever possible, one should distinguish recent cases because of differences in legal subject matter or because of factual differences, and not ask either for the case to be overruled nor subject it to severe criticism. Judges, being human, hate to admit they were wrong. It is their offspring, however misshapen it may be. While they may disown it, where there is no alternative, every father would be reluctant to take such a step. Pat it upon the head kindly, say that it takes after Uncle Otto, walk around it, and go on your way."

Mr. Appleman criticizes the canned or written speech. "In short, neither do they shed light upon the controversy nor do they bring persuasion to the minds of the justices."

It is apparent that the author has had considerable experience under a great variety of circumstances. He drops worthwhile hints not only about such technical matters as the record, the brief and the argument, but the appearance and manner of dress of the advocate. "In the Supreme Court, formal attire used to be mandatory. It is still welcomed, although plain dark blue or black suits are more commonly observed in these days except upon government attorneys. A non-government attorney, attired formally, creates a first impression that he is a person of substance in his community; although, at the close of argument, the quality thereof may make the judges feel that the community is not too exacting in its measurement of men."

Mr. Appleman points out some of the deadly sins of oral argument. With reference to the all-too-common phrase "Your Honors are far more familiar with this rule than I am", Mr. Appleman says: "Fawning upon the court is generally recognized for what it is—an attempt to substitute servility for a feeling of rightness in one's cause. One's personal dignity should induce him to refrain from the above or from much less subtle efforts. Besides this, and more to the point, perhaps, the court has been wooed by experts and recognizes attempts at seduction when it sees them."

Mr. Appleman emphasizes that the purpose of an appeal is to induce the appellate court to take affirmative action. He suggests: "It is better to be less prepossessing, less eloquent if necessary, if the proper result be secured. Obviously, one is not going to win every case upon appeal, since courts are fallible even if attorneys are not, but one must not lose sight of the objective desired upon appeal, which is success."

Mr. Appleman points out one of the dominant factors on appeal and that is the human quality of the appellate judge. He speaks of the

various factors which induce courts to decide cases in the manner in which they do. One of such elements is the fear of appearing absurd. On this Mr. Appleman says: "One must work upon this avenue of persuasion by indirection, never approaching it squarely. If one said to a judge: 'You don't dare rule against me or this will be the only court adhering to such an absurd rule'; in all likelihood he would bristle, stick out his chin, and reply, 'Very well, this court is in a majority of one.' But suppose instead one should say: 'This reasonable rule for which we contend, is founded, as your Honors will recognize, upon a sound evidentiary position. Greenleaf, in his leading work upon Evidence, first announced this principle many decades ago. Dean Wigmore, as we have shown, developed it in all its elements. Since then, sixteen states which have encountered the principle have taken a like view. No state has asserted a contrary rule. In view of the fact that justice is greatly promoted by adherence to this doctrine, we urge this court to lend the weight of its authority to its enforcement.' He might well succeed."

Urging humility as a worth-while attribute of the appellate practitioner, Mr. Appleman applies the rule to himself: "When I was younger and more scholarly, I wrote masterly appellate briefs, and lost my cases. I exhausted the law and the judges. The briefs were lengthy, literate, and cold. Then, suddenly, one day I made a great discovery which altered my entire approach to appellate practice. I discovered that judges were human beings. This is not intended to be a facetious statement. Those of us who practice law, and particularly younger lawyers, are too prone to regard appellate court judges as remote beings in some far-off firmament, unapproachable and distant, invested with different types of minds, with a queer type of reasoning mechanism, studded with scalpel-like edges which automatically cut out the meat of relevant decisions for use in an appropriate situation. Thus we would pour in a volume of their raw meat—i.e., stare decisis—and wait for the wheels to spin around and the knives to start cutting. To our disappointment, the diet was inadequate and the opinions seemed undernourished."

No literary work is, of course, perfect. On the other hand, we do not believe that it is the function of a critic to be critical merely for the sake of criticism. Mr. Appleman has convinced us that he is a lawyer, if for no other reason than the fact that he has not followed his own advice. He states: "Above all, a lawyer, as an officer of the court, is supposed to be a gentleman, and gentlemen do not engage in verbal brawls more suited to alleys than to the rostrum of a court of last resort." "Vulgarity will never bring a nod of approval." Mr. Appleman then ignores his own advice by the use of intemperate language.

Speaking of the duty of the lawyer for an appellant to take advantage of errors committed by his opponent for the sake of protecting his own client, Mr. Appleman expresses the following thought: "His unlucky opponent may consider him a prize s.o.b., but the advocate's task is to represent his client to the best of his ability, not to run a nursery school for opposing counsel."

Speaking of an occasion when he was once called upon to endeavor to persuade the Railroad Adjustment Board to reverse itself, Mr. Appleman states: "The Board, asked to reconsider and to take affirmative action of some sort, politely thumbed its nose in reply." We are reasonably certain that on reflection Mr. Appleman would conclude that his original advice was correct. Without condoning such language, even if it has been used on occasions by a former President of the United States, we conclude that it does not substantially detract from the overall purpose and merit of the work.

The old hand may very properly conclude that *Successful Appellate Techniques* contains an unnecessary amount of samples of the record, briefs and transcript from adjudicated cases. The younger practitioner, on the other hand, may find these samples of inestimable value. *Successful Appellate Techniques* is a partial substitute for that abandoned type of study where the young aspirant to the Bar reads law in the office of the town's leading and most successful lawyer.

Much of the value of *Successful Appellate Techniques* is the exposition of that type of wisdom which might very properly be expounded by a member of the court who is anxious to advise counsel on how best to present his appeal from the viewpoint of the appellate judge. Mr. Appleman does not claim any experience as an appellate judge, but he appears to have a very clear insight into the thinking of most appellate judges.

Consequently, we would not be surprised to see the rules of some appellate courts amended to provide that *Successful Appellate Techniques* is required reading.

CHARLES A. LORING
Los Angeles, California

A CATALOGUE OF THE LAW COLLECTION AT NEW YORK UNIVERSITY WITH SELECTED ANNOTATIONS. *Compiled and Edited by Julius J. Marke. New York. The Law Center of New York University. Distributed by Oceana Publications. 1953. Pages 1372. Price: $22.50.*

It has been my privilege to be Visiting Professor of Law at New York University Law School during the present academic year (1953-1954). Many things at this beautiful Law Center have impressed me but none more than the making of this book.

Although I was not there, I can see Arthur T. Vanderbilt, the then Dean, striding through the law library with Julius Marke and saying "Why don't law librarians stop persecuting their customers by forcing them to go through an endless card catalogue to find out what books there are in the library?" And he probably went on to say "You know,

Julius, I'd like to read all the books here but there is not time. What I'd like is one book to tell me what books there are in this library and what is even more important what is in those books so I can make up my mind which I want to read."

As Julius Marke tells us in his introduction, Emerson said the same thing about libraries when he complained there was "no Professor of Books" and "your chance of hitting on the right one is to be computed by the arithmetical rule of Permutation and Computation, not a choice out of three caskets, but of half a million caskets all alike" and "it is the law of their limbo" that a book "must not speak until spoken to" so a library needs "a charitable soul" to aid your selection.

Aptly, Law Librarian Marke says that in preparing this annotated catalogue of the more than 120,000 volumes in the New York University Law Library in 1950, he has "been cast in the double role of Emerson's 'charitable soul' and Judge Vanderbilt's 'locksmith'."

The book divides into eleven sections: sources of the law; history of the law and its institutions; public and private law (arranged by subject); comparative law; jurisprudence and philosophy of law; political and economic theory; trials; biography; law and literature; periodicals and other serial publications; and reference material. At the end of the book is a carefully prepared subject index of more than 4,000 headings as well as an alphabetical author index of all books. Pocket supplements will keep the catalogue up to date.

Here is the way you use the book. Suppose you are a practicing lawyer at Yuma, Arizona, and you have just been retained in an antitrust case. Having gotten the client you need to get educated and fast. You go to your county law library and consult the librarian. If the county library at Yuma resembles the one in Chemung County, New York, or Hamilton County, Tennessee, the two I know best, you will regretfully be told that there are no books on the subject in the library and the librarian has no books to suggest to you to read.

But alas how different and how much more helpful would the librarian's answer be to the busy inquiring lawyer if she could reach for Marke's annotated catalogue!

Let's do it. We go to the subject index. Page 1216 tells us at once that division 75 of Section III devoted to Public and Private Law lists antitrust books under the title "Monopolies, Combinations and Restraint of Trade", pages 728-735, including the casebooks in the field.

Examining pages 728 to 735 is a fascinating experience. All the leading books and addresses made by leaders in the field will not only be found here but what is more to guide you will be an extract from a book review of the book. For instance, there is a most informative extract from the foreword by Thurman Arnold to the book of Edward P. Hodges, entitled "The Anti-Trust Act and the Supreme Court", telling you why the book is so valuable and of Mr. Hodges's great experience in the antitrust division of which he is now second in command. In the case of another leading text a reviewer in the extract quoted says, "the impression is given that this was a paste and scissors job with inadequate editorial synthesis" (Jack L. Ratkin, 35 *Cornell Law Quarterly* 718).

I know you will agree with me that this is great help indeed. It is as if Julius Marke stood next to you and gave you the best gossip in our trade as to the value or lack of value of a particular book in the field in which you are researching.

There are dangers in this, but testing the catalogue in the fields I know, I should say that Julius Marke has used rare judgment and the extracts he has selected, be they book reviews or forewords, have been very well done. Some reviewers are bound to be wrong, but it is obvious that before he made his selection Marke read many and took his quote with the thought in mind of presenting to our trade the most informative one.

The result is, whether you are a lawyer in Yuma or Chemung County, New York or Hamilton County, Tennessee, you can have at your finger tips by means of an interlibrary loan in a very short time precisely the best books in the field, to let you impress that new client or spellbind the local Chamber of Commerce as the keynote speaker at the annual clambake.

In his review of this catalogue, Vincent E. Fiordalisi, Law Librarian at Rutgers Law School, says Marke's book "as a research instrument for the legal profession is second only to the Index to Legal Periodicals". (28 *N. Y. U. Law Review* 1338). As one who has always begun his research with the *Index to Legal Periodicals*, I agree with its value but I would put the catalogue first. The fellow at Yuma or in Chemung or Hamilton Counties can send for a book in the field but it is not so convenient to send for law reviews although it can and should be done. Both books are needed in every county law library.

Incidentally, consider the lawyer practicing in New York or other large metropolitan centers within easy reach of either the N. Y. U. Law Center or a similar library. He is "doubly blessed", to quote Fiordalisi again. No large law office in any metropolitan area can afford to be without the book for this reason.

But even more valuable is this catalogue to lawyers and librarians abroad. As the *Journal of the Society of Public Teachers of Law* (Vol. II, No. 2, New Series 1953, London, England, page 146) says, Julius Marke "and all concerned have earned the best thanks of all users of law libraries, not the least of those outside the United States to whom the content of much scarce American material is revealed". The United States Information Libraries should take note of this British comment as it indicates the value of having the catalogue available in Europe, South America, Asia, Africa and Australia to promote understanding of our

law by informing researchers there what books to draw on loan from American libraries.

It is interesting to learn that the New York University Law Library has become the ninth largest university law library. In order the first eight are:.

Harvard -	656,000
Yale -	339,000
Columbia -	315,000
Michigan -	228,065
Minnesota -	189,130
Northwestern -	153,000
University of Chicago -	129,000
University of Pennsylvania -	121,000

As Professor John C. Payne of Alabama Law School points out in his review (6 *Journal of Legal Education* 411 at 413) up to the present there has been no qualitative evaluation of any modern law library. The nearest thing to Marke's catalogue is the Harvard Law Library Catalogue of 1906, which merely listed alphabetically 110,000 volumes without any qualitative analysis. This indicates the breath-taking achievement of this work.

To lawyers, law librarians and researchers everywhere, the publication of this catalogue after five long years of research by Julius Marke is another monumental triumph for the Law Center of New York University. It is a ten strike which puts our profession once more heavily in debt to that gallant crusader, Arthur T. Vanderbilt, who has carried his legal reform blitz into the cobwebbed halls of our law libraries to save our eyes, arms, backs and necks from those damnable card indexes.

ARTHUR JOHN KEEFFE
New York, New York

THE GROWTH OF SCANDINAVIAN LAW. *By Lester Bernhardt Orfield. Philadelphia: University of Pennsylvania Press for Temple University Publication. 1953. $8.50. Pages xx, 363.*

Scandinavian law and history have unfortunately been neglected in the United States. In the words of Professor Orfield, "Unhappily, the law of the Scandinavian States has attracted but little attention." This is so for several reasons. Scandinavian lawyers and judges did not immigrate to the United States in the great wave of migration toward the turn of the century. The immigrants who did come did not bring with them books on Scandinavian law, though they brought books on history, literature, music, religion and science. The immigrants may have talked about "arveret", the law of inheritance, and related some humorous stories about the "lensman", or sheriff, but beyond that they were silent as to the laws of their respective countries.

Moreover, although the Scandinavian history books and newspapers presented brief surveys of the historical development of the governments of Denmark, Iceland, Norway and Sweden, it was beyond their objectives to deal with Scandinavian law. It was therefore both timely and appropriate that Professor Orfield should publish this comparative study of the development of the legal systems of these four countries.

The title is a fitting one in view of its contents. His book deals not only with modern social legislation but includes a concise and accurate study of the legal system, the governmental system and the political and military history of Denmark, Iceland, Norway and Sweden. His main headings are Danish law, Icelandic law, Norwegian law and Swedish law. Under each of these headings the topics are international relations, customs, case law and codes, the king, the constitution, the courts, local government, religion, agriculture, criminal law, civil procedure, social legislation, uniform Scandinavian laws, legal education and legal history.

The book conveys the idea that lawyers, jurists and law teachers who live in the so-called smaller nations have certain advantages. Since they are in close contact with the agencies of government they influence public opinion within a short time. Their research studies influence legislation and promote legal reform. However, with a limited budget the publication and distribution of their research may be extensive within their respective countries but practically unknown to the rest of the world.

These four nations have over a thousand years of growth of customary laws. Customary laws in Scandinavian countries are primarily written laws. There are great possibilities for extensive research in comparative law based on these written records. With similar languages, economic conditions and social problems, the lawyers of these four countries, with the approval of their respective governments, have taken a real interest in preparing uniform codes on the entire civil and criminal law.

Professor Orfield has thus filled a void space on the bookshelf of comparative law. His book will be appreciated by students of Scandinavian legal history. The bibliographies are both comprehensive and useful, and the work itself is so interesting that it invites the reader to further study. The author and Temple University deserve to be complimented for making this study available to legal scholars.

O. H. THORMODSGARD
University of North Dakota
Grand Forks, North Dakota

SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE. *By Harold F. Birnbaum. Published by the Committee on Continuing Legal Education of the American Law Institute collaborating with the American Bar Association, 133 South 36th Street, Philadelphia 4, Pennsylvania. 1954. $5.00. Two volumes. Pages 374.*

This book is the first of a series on the Uniform Commercial Code published, or to be published, by the Committee on Continuing Legal Education of the American Law Institute in collaboration with the American Bar Association. It deals exclusively with Article 9 of the Code and was written by a man who has had an important part in the drafting of that article. In general, Article

9 is the first systematic scheme to provide a reasonably uniform and reasonably simple method for perfecting a lien (the Code calls it a "security interest") in almost any type of personal property. Article 9 abolishes the troublesome distinctions now resulting from the fact that a particular kind of instrument —say, a conditional sales agreement— was used rather than another instrument, say a chattel mortgage.

Mr. Birnbaum's book is a valuable working tool for the lawyer whose practice in any way involves the use of any form of personal property as security for an obligation, whether or not the Uniform Commercial Code happens to have been adopted in the jurisdiction in which that lawyer practices. Because of the Code's interesting sections dealing with conflicts of laws problems it may very well be possible that a security agreement drawn in a state which has not adopted the Code may be tested in a state in which the Code has been adopted.

In his brief introduction the author has set forth the principal problems in the present law which the Code is designed to cure, or at the very least, minimize. In each of the succeeding chapters he has outlined the problems in connection with security interests affecting a different kind of personal property, for instance Chapter I deals with equipment, Chapter II with inventory, Chapter VI with farm products, timber and oil. In turn, each chapter discusses with respect to that kind of property the validity and forms of a security agreement, the acquisition of a security interest on after-acquired property, the securing of future advances, the necessity and place of filing, and the remedies and duties of the parties on default.

On the whole there is no doubt that the book's value is increased by the fact that it was written by a person who has been associated with the development of Article 9 from the ground up. However, in some ways that close relationship may have somewhat handicapped the author: First, he is much too modest in his appraisal of the excellent job which has been done by him and others on Article 9 and second, his division of subject matter is no doubt influenced, in part at least, by the early drafts of the Code in which the primary division of subject matter was based upon the nature of the personal property in which the security interest was created. To the lawyer whose security problems are concentrated on a particular kind of personal property, Mr. Birnbaum's division will be more helpful than any other form of organization and there certainly is room for at least one text based on this division. That division, however, especially for the person being introduced to the Code's new arrangement, may tend to overemphasize the differences in legal effect (many of which are relatively unimportant) which are based upon the nature of the collateral. The categories into which the Code divides different kinds of collateral are not quite as rigid as this separate treatment in the text might lead one to believe. Since a refrigerator under some circumstances may be "equipment" the reader may assume that the answer to his problem will be found in the text's discussion under that heading, whereas according to the facts of his particular case this refrigerator may be "inventory" or "consumer goods". Further, some of the space taken up by this duplicate treatment (or, as the author more accurately terms it, parallel treatment) might better have been taken up by more of the author's generally excellent analytical treatment. It is hoped that the author will some day expand the concentrated treatment of Article 9 as an integrated unit which he has given in his article in the March, 1952, issue of the *Wisconsin Law Review*, entitled "Article 9—A Restatement and Revision of Chattel Security".

PETER F. COOGAN
Boston, Massachusetts

OIL AND GAS RIGHTS. *By Victor H. Kulp. Boston: Little, Brown and Company. 1954. $15.00. Pages xiii, 410. (Reprinted from American Law of Property).*

This volume was not written for the experts in the field of mineral law. Rather, it is a short and comprehensive text for the use of the practitioner when he encounters his first legal problem in the field of oil and gas. It is intended to acquaint him with the terminology, the fundamental principles, the general rules, and the basic source materials. As such, the volume is superb.

The book is authoritative. Dr. Kulp has contributed much through the years to the legal literature in the field of oil and gas law. He taught the subject for many years at the University of Oklahoma and in summer sessions at other law schools.

The volume consists of the complete text of part ten of the American Law of Property treatise and a seventy-one page supplement of citations and comments on new developments which was prepared by Dr. Kulp as of January 2, 1954. Almost half of the text is devoted to an examination, section by section, of the oil and gas lease—the interests and rights of lessor and lessees, the granting clause, the duration of the lease, the exploration and drilling and operation terms, the rents and royalties and the forfeiture and termination provisions, the express and implied convenants, and the transfer of mineral interests and rights. In addition to the lengthy treatment of the lease, there are separate chapters on governmental control of the industry, the rights and duties incident to drilling operations, the storage and use of oil and gas, and the obligations peculiar to oil transportation companies.

The seasoned practitioners of oil and gas law will find here an authoritative evaluation of existing rules and the unseasoned practitioners will find an essential primer on things basic in the field of mineral law. And both groups will find it to be an indispensable guide to the source materials.

JOHN G. HERVEY
Oklahoma City, Oklahoma

INVENTIONS AND THEIR PROTECTION. *By George V. Woodling. Albany, New York: Matthew Bender & Company, Inc. 1954. $10.00. Pages 474.*

It is seldom that a patent text is written by one experienced as an engineer, practitioner and teacher. Mr. Woodling has these qualifications, as his book evidences. It is thoroughly practical in its approach, yet comprehensive enough to use as a text. While it was primarily designed for the engineer and businessman as a guide through the intricate mazes of the patent law, it has been used by Mr. Woodling as a text in his graduate course on patent law at Western Reserve University. It should prove useful to a lawyer engaged in the general practice who occasionally runs into patent problems.

On the other hand, the book will be of limited use to patent attorneys. It does not purport to be a treatise. Mr. Woodling's effort has been to cover the field of patent practice, concentrating on procedure of prosecution without delving deeply into the theoretical. The result is not, and is not meant to be, exhaustive.

Following some orientation material, Chapter One, provocatively entitled "Making Your Patents Pay", points out the importance of obtaining a broad patent and the need for co-operation between the inventor and those associated with him. Then follows a chapter giving general background on various patent problems.

The next several chapters set out in step-by-step order the process of prosecuting a patent; starting with disclosures, rights between employer and employee, and patentability, it carries through the application, including two detailed chapters on claim drafting and a chapter on interferences. Finally, there are chapters on infringement, design patents, assignments and licenses and trademarks. There are references to copyrights but no comprehensive treatment of them.

The book may be praised for the author's remarkable ability to select for discussion problems which arise in everyday practice. For a relatively short book with a wide subject area, it is very complete. For instance, the user can find such information as the price of copies of patents, or he can by reference to a handy chart be reminded of the various requirements for patentability or he can read a discussion of protecting an idea as a trade secret.

In general the material flows smoothly from one point to the next. Thus the reader is able in a few minutes' time not only to find the answer to his specific question, but also to read beyond and fit the question into the matrix of the law. In some instances the book seems to be deficient in organization. The second chapter, for example, is a miscellaneous collection of valuable information which logically belongs in the more detailed treatment of the various subjects. This difficulty is partly offset by a good index.

For the engineer or businessman, the book probably is well balanced in content. For the practicing lawyer and for the student, however, it is the writer's opinion that insufficient consideration is given assignment and licensing problems. There should be at least one full chapter on the problems involving restraint of trade and the other antitrust questions which arise so frequently. So much of the value of a patent is determined by how it is used that no text can properly omit a full discussion of this point. Further, because much research is now done under government auspices, a more thorough treatment of the rights of the parties to an idea conceived under such circumstances would be an improvement. A more comprehensive treatment of copyrights would add to the book's utility.

In spite of these deficiencies, the book is extremely valuable to have at hand. Its combination of readability and coverage of not only fundamentals but the questions which arise in practice make it well worth its moderate cost.

JOHN H. KELLOGG, JR.
Cleveland, Ohio

RAILROAD WAGES AND LABOR RELATIONS, 1900-1952, *By Harry E. Jones. New York: Bureau of Information of the Eastern Railways, 1953. No charge. Pages viii, 375.*

Because of the influence which railroad labor policies have had, directly and indirectly, on many other segments of industry, this book is of importance to all attorneys in the field of labor relations.

The author, Chairman of the Executive Committee of the Bureau of Information of the Eastern Railways and Chairman of the Eastern Committee for the National Railroad Adjustment Board, has been actively associated for forty-four years with the dynamics of the railroad labor movement. His breadth of experience contributes to an incisive study.

The main body of the book is divided into two parts: (a) A historic survey of the earnings of both operating and nonoperating employees, with particular emphasis on the improvement in actual and "real" wages since 1929; (b) A summary of the results—for the employees, the industry, and the bondholders and stockholders. Included are detailed analyses of many other important developments in the labor policies of the railroads such as vacations, union shop and check-off authorizations, and the conciliatory processes of the railway labor act. More than one hundred tables and charts are utilized to present statistics. A detailed index facilitates the use of this most informative book.

FRANK E. COOPER
Detroit, Michigan

FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD. *By Bernard Schwartz. New York: New York University Press. London: Geoffrey Cumberlege, Oxford University Press. 1954. $7.50. Pages 338 plus appendices.*

About all that ought to be said about this book here is that it should be required reading for all those in-

terested in the subject of administrative law—American, English or French. As a scholar, Professor Schwartz has responded to the challenge of this esoteric field far beyond the call of academic duty; not content with studies and writing in this country, he spent a year in England and produced a thoughtful book; and now, after a year in France, we have his masterpiece.

It is a book long, long overdue. Dicey (if he were alive) and Hewart, just across the Channel from France, should literally hang their heads for popularizing in the English-speaking world an idea of *droit administratif* which is as erroneous as it is widely accepted. Curious it is that this century of scholarship and keen (even violent) interest in the subject has run more than half its course before the much-reviled (now we must say, much misunderstood) French system was thoroughly explored by an American scholar and presented in the American language for American readers.

Simple procedure, inexpensive litigation, broad judicial review (on the *facts* as well as law), "a bias in favor of individuals seeking review", and more are features of the French system. These are all things much to be prized here, but thus far so seemingly unattainable that they are regarded as either visionary or reactionary in this country.

Students—young and old, in law schools and out—will, however, find the book of special interest and value because it is not about French administrative law, but about *comparative* administrative law. As its title indicates, it deals with the French system on the background of what we call the "common-law world"; in other words, it describes and compares the system and subject in three countries in one book instead of three. As a treatise on theoretical administrative law, it is thus a volume which should furnish any careful and intelligent reader with, so to speak, an indispensable aerial photograph or relief map of most of the administrative-law world. Professor Schwartz is too good a teacher to permit "brilliant writing" to slight his purpose; and too candid a scholar to fail to quote liberally (but pithily) all those who have made contributions to the subject heretofore. On every point the American, English and French theories and practices are painstakingly (but readably) summarized. Except that the American administrative court proposal is twice drawn in somewhat out of context, his treatment is systematic, clear and most rewarding.

CARL MCFARLAND

University of Montana
Missoula, Montana

BAKER CHART OF ANCESTORS AND NEXT OF KIN IN THE CIVIL LAW. *By Kirby S. Baker. Springfield, Massachusetts: Empire Mailing Company. $3.75.*

As stated in the "Introduction" "Most of the States in this country follow the civil law in determining descent and in distributing intestate property". That this is so in Massachusetts, see Newhall "Settlement of Estates" (3d Ed. page 468.) Mr. Baker, an assistant register of the Probate Court in Hampden County, Massachusetts has prepared this chart with "work sheets" (available in quantity) for the convenient ready reference by attorneys, banks, genealogists and others in connection with descent and the distribution of intestate property and other problems. The chart is designed for framing for convenience in explaining family relationships to clients and others, and the "work sheets" for filing.

FRANK W. GRINNELL

Boston, Massachusetts

THE FOUNDING FATHERS. *By Nathan Schachner. New York: G. P. Putnam's Sons. 1954. $6.00. Pages x, 630.*

The title of this book, though attractive and likely to win persons to buy and read it, may be somewhat misleading. I definitely think the book is a proper, journalistic history of the Washington and Adams Administrations. It does not actually treat of the Founding Fathers in a separate sense. The book begins with Washington's departure from Mt. Vernon in 1789 for New York to take the oath of office as President of the United States, and it ends with the election of Jefferson and Burr to succeed Adams and Jefferson in 1801. "The Founding Fathers" is an attractive name which surely most people associate with the founders of our country, mainly in the Revolutionary period and incident to the Declaration of Independence, the actual war and the drafting of the Constitution. For instance, Benjamin Franklin is often named with the most distinguished of the founding fathers, yet he is not named at all in the official list in this volume. On the other hand, Aaron Burr is included and is perhaps the only one in the whole list for whom the author seems to feel real warmth. True, Burr was an active politician during these twelve years, but he was not Vice President until *after* this period, and his activities during the period were mostly local and certainly on the level of clever politics rather than significant principles of any kind. For the author to elect to treat him as an equal in point of statesmanship with such men as Washington, Hamilton, Jefferson and others seems to overemphasize petty politics as against everything else.

The book is made on the basis of almost innumerable quotations from the letters and newspapers and other current sources of the time. It makes lively reading. For instance, the Whisky Rebellion and Hamilton's grandiose army are made more vivid and convincing than in any other account I can remember. The whole book is lively and extremely readable, for stimulus and diversion in the field of unadulterated and ruthless political activities. It seems to represent a colossal amount of research into source materials, and exciting presentation of such extracts from all of these sources. How the author could collect so many and present them so effectively is in itself a source of amazement. For all his particularity, he makes at least these

(Continued on page 634)

Review of Recent Supreme Court Decisions

George Rossman
Editor-in-Charge

ALIENS

Rights of American Creditor to Funds Seized by Alien Property Custodian

■ *Brownell* v. *Singer, Superintendent of Banks of the State of New York* v. *Singer*, 347 U. S. 403, 98 L. ed. (Advance p. 503), 74 S. Ct. 555, 22 U. S. Law Week 4211. (Nos. 401 and 402, decided April 5, 1954.) *Judgments of the Court of Appeals of the State of New York reversed.*

The Court's *per curiam* opinion in these cases consisted of the single word *reversed* and the citation of a single case: *Zittman* v. *McGrath*, 341 U. S. 471.

The CHIEF JUSTICE took no part in the consideration or decision of the case.

The facts are set forth by Mr. Justice JACKSON in his dissenting opinion in which Mr. Justice FRANKFURTER and Mr. Justice DOUGLAS joined. Briefly stated, the assets of a Japanese banking agency were surrendered to the New York Superintendent of Banks for liquidation immediately after the declaration of war against Japan in 1941. The funds at issue here were creditor's claims against the agency earmarked for payment to the American creditor. The Court's decision sustained an order requiring that the funds be turned over to the Attorney General as successor to the Alien Property Custodian. The view of the dissenting justices was that this creditor was entitled, under New York law, to the funds, and that the funds were not "payable or deliverable to, or claimed by, a designated enemy country or national thereof", within the statutory language which was the only authority under which the Custodian might have seized the funds.

The cases were argued by James D. Hill for petitioner in No. 401 and by Albert R. Connelly for the respondent.

BANKRUPTCY

Compulsory Merger of Two Railroads

■ *St. Joe Paper Company* v. *Atlantic Coast Line Railroad, Lynch* v. *Atlantic Coast Line Railroad, Aird* v. *Atlantic Coast Line Railroad, Welbon* v. *Atlantic Coast Line Railroad*, 347 U. S. 298, 98 L. ed. (Advance p. 443), 74 S. Ct. 574, 22 U. S. Law Week 4190. (Nos. 24, 33, 36 and 37, decided April 5, 1954.) *Judgment of the Court of Appeals for the Fifth Circuit reversed and remanded.*

Does Section 77 of the Bankruptcy Act authorize the Interstate Commerce Commission to submit a plan of reorganization to a district court whereby a debtor railroad can be compelled to merge with another railroad that has no prior connection with the debtor? The Supreme Court answered *no* in a four-to-three decision.

Speaking for the Court, Mr. Justice FRANKFURTER based the decision on the legislative history of Section 77. The Court said that in the "long and tortuous" history of the statute there was a clear thread of congressional refusal to sanction any mergers other than those voluntarily initiated by the participating carriers. The Court pointed out that Section 5 of the Interstate Commerce Act forbids a forced merger of two carriers, and it refused to rule that Congress had adopted the opposite policy *sub silentio* in enacting Section 77. On the contrary, the Court held that Section 77 incorporates Section 5 of the Interstate Commerce Act. The Court also held that the so-called "cramdown" clause had no bearing on the case, reasoning that a vast majority of Section 77 proceedings involve internal reorganizations in which the cramdown provision has a purpose and scope of application wholly independent of mergers.

Mr. Justice BLACK and Mr. Justice CLARK took no part in the consideration or decision of the case.

Mr. Justice DOUGLAS, joined by Mr. Justice BURTON and Mr. Justice MINTON, dissented, arguing that the real issue was whether the Commission "may include in a plan of reorganization a provision that the debtor or bankrupt railroad should be merged with another road and submit that plan for approval or disapproval to the security holders who are entitled to vote on a plan". There was no question of "foisting" the merger on one party or the other, the dissent declared.

The cases were argued by William D. Mitchell for petitioners and by Edward W. Bourne for respondent.

COMMERCE

State Tax on "Gross Receipts" on Company Conducting only Interstate Commerce in State

■ *Railway Express Agency* v. *Virginia*, 347 U. S. 359, 98 L. ed. (Advance p. 482), 74 S. Ct. 558, 22 U. S. Law Week 4186. (No. 163, decided April 5, 1954). *Judgment of the Supreme Court of Appeals of Virginia reversed and remanded.*

At issue in this case was the validity of an "annual license tax" levied on express companies doing business in Virginia.

The Railway Express Agency, Inc., is a Delaware corporation which op-

Reviews in this issue by Rowland L. Young.

erates in interstate and intrastate commerce in every state but Virginia. That commonwealth has a constitutional prohibition against any foreign corporation exercising any public service powers or functions. Accordingly, Railway Express does no business in Virginia except interstate commerce under the protection of the commerce clause. The tax at issue was measured by gross receipts earned in the state "on business passing through, into or out of this State". The state contended that this was not a privilege tax, although it was so labeled, but a property tax laid on the intangible value of the good-will or going-concern status of the company.

In reversing the highest state court, Mr Justice JACKSON, speaking for the Court, declared that the practical effect of the tax placed its impact squarely upon gross receipts without consideration of their effect on the value of any of the classes of property recognized elsewhere in the statute. The Court pointed out that the value of the company's real and tangible personal property in the state was assessed at $129,279, while its tax on the gross receipts basis was $66,454.71, over 50 per cent of the total value of its real and tangible personal property in the state. The Court figured that this meant that every dollar invested in tangible property was worth over $100 in the form of good will. "This may not overtax the express company," the Court quipped, "but it does overtax our credulity." The conclusion was that the tax was just what the legislature had labeled it—a privilege tax that could not be applied to an exclusively interstate business.

Mr. Justice CLARK, in a dissent in which he was joined by the CHIEF JUSTICE, Mr. Justice BLACK and Mr. Justice DOUGLAS, declared that the tax was nondiscriminatory, fairly apportioned, and not excessive. He argued that the Court had gone out of its way to pin the label "privilege tax" on the statute and in doing so created an additional obstacle in the states' continuing efforts to make interstate business units pay a fair share of the cost of state facilities and services.

The case was argued by Thomas B. Gay for appellant and by Frederick T. Gray for appellee.

COMMERCE

Collection of "Use Tax" from Seller of Goods in Another State

■ *Miller Brothers Company* v. *Maryland,* 347 U. S. 340, 98 L. ed. (Advance p. 470), 74 S. Ct. 535, 22 U. S. Law Week 4181. (No. 160, decided April 5, 1954.) *Judgment of the Court of Appeals of Maryland reversed and remanded.*

The Court here ruled unconstitutional an attempt by Maryland to collect a use tax for goods sold by the appellant Delaware merchandiser to residents of Maryland. Appellant sells directly only to customers at its store in Wilmington and does not take orders by mail or telephone. Residents of nearby Maryland come to the store and make purchases. The goods bought are sometimes carried away by the customer and sometimes delivered in Maryland by common carrier or by appellant's own truck. In this case, Maryland attempted to collect its excise tax on the "use, storage or consumption" in the state of such articles by seizing and holding one of appellant's trucks making a delivery in Maryland.

The Supreme Court held the tax to be in violation of the due process clause in an opinion written by Mr. Justice JACKSON. The Court declared that the practical effect of the tax was to make the Delaware vendor liable for a use tax due from the purchaser, and in economic effect the tax is identical with making the vendor pay a sales tax. The Court was unable to find any precedent for sustaining the liability asserted. While the previous cases are admittedly not altogether consistent, the Court said that they indicated consistent adherence to a "time-honored concept" that "due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax".

Mr. Justice DOUGLAS, joined by the CHIEF JUSTICE, Mr. Justice BLACK and Mr. Justice CLARK, argued in a dissenting opinion that appellant's sales clerks would know that the goods were destined for Maryland when they arranged for shipment of purchases and that it would only be a minimal burden to add the Maryland use tax to the bill. Appellant's actions were said to be a regular course of conduct of reaching Maryland consumers by advertising and delivery by its own trucks.

The case was argued by William L. Marbury for appellant and by Francis D. Murnaghan, Jr., for appellee.

CONSTITUTIONAL LAW

"Separate but Equal Doctrine" Held To Violate Equal Protection

■ *Brown* v. *Board of Education, Briggs* v. *Elliott, Davis* v. *County School Board, Gebhart* v. *Belton,* 347 U. S. 483, 98 L. ed. (Advance p. 583), 74 S. Ct. 686, 22 U. S. Law Week 4245. (Nos. 1, 2, 4 and 10, decided May 17, 1954.) *Cases ordered restored to docket for further argument on question of appropriate decrees.*

In one of its most important decisions in recent years, a unanimous Court handed down its long-expected decision on the constitutionality of racial segregation in public schools. The Court reversed its 1896 decision in *Plessy* v. *Ferguson,* 163 U. S. 537, which upheld the validity of segregation provided equal facilities are given for both white and colored students.

The CHIEF JUSTICE, speaking for the Court, based the opinion on the "effect of segregation itself on public education" and the "present place" of public education in American life, rather than on the circumstances surrounding the adoption of the Fourteenth Amendment. The Court pointed out that four recent decisions, beginning with *Missouri* ex rel. *Gaines* v. *Canada,* 305 U. S. 337, had found inequality in the treat-

ment of Negro graduate students. In the present cases, however, the Negro and white schools had equal facilities or substantially equal facilities.

The Court declared that "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education", and it found that segregation tends to retard the educational and mental development of Negro children. "Separate educational facilities", the Court said, "are inherently unequal." Because of the wide applicability of the new doctrine and the variety of local conditions, the Court took the unusual step of deferring the formulation of decrees, pending further argument. It called upon the states affected by the decision to participate in the further proceedings.

The cases were argued by Robert L. Brown for appellants and by Paul E. Wilson for appellees in No. 1; by Spottswood Robinson III and Thurgood Marshall for appellants and by John W. Davis, T. Justin Moore and J. Lindsay Almond, Jr., for appellees in Nos. 2 and 4; and by H. Albert Young for petitioners and by Jack Greenberg and Thurgood Marshall for respondents in No. 10. Assistant Attorney General J. Lee Rankin appeared for the United States as *amicus curiae* in Nos. 2 and 4.

■ *Bolling* v. *Sharpe*, 347 U. S. 497, 98 L. ed. (Advance p. 592), 74 S. Ct. 693, 22 U. S. Law Week 4249. (No. 8, decided May 17, 1954). *Case restored to docket for reargument on question of appropriate decree.*

This case, a companion to Nos. 1, 2, 4 and 10, *supra*, dealt with the validity of segregation in the public schools of the District of Columbia. It was treated separately because the Fifth Amendment, unlike the Fourteenth, has no equal protection clause, which was the foundation of the Court's decision in the above cases.

The CHIEF JUSTICE, again speaking for a unanimous Court, held that the due process clause of the Fifth Amendment prohibits segregation in the schools of the District. The opinion denied any implication that "due process" and "equal protection" are always interchangeable phrases, but declared that it was "unthinkable" that the Constitution prohibits the states from maintaining racially segregated public schools while allowing a federal jurisdiction to do so. "Segregation in public education is not reasonably related to any proper governmental objective", the Court said, "and thus it imposes on Negro children in the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process clause."

The case was argued by George E. C. Hayes, and James M. Nabrit for petitioners and by Milton D. Korman for respondents.

CRIMES

Possession of Property Intended for Use in Violating Revenue Laws

■ *United States* v. *Dixon*, 347 U. S. 381, 98 L. ed. (Advance p. 489), 74 S. Ct. 566, 22 U. S. Law Week 4177. (No. 500, decided April 5, 1954.) *Judgment of the United States District Court for the Northern District of Georgia reversed.*

Appellee was indicted under Sections 3116 and 3115 of the Internal Revenue Code for possessing 800 pounds of sugar and parts of a still, the Government contending that those sections make it a criminal offense to possess property intended for use in producing nontax-paid distilled spirits. The district court dismissed the indictment on the ground that Section 3116 is preventive and remedial rather than criminal, and that it does not define a criminal offense.

The Supreme Court reversed, speaking through Mr. Justice CLARK. Section 3115 is captioned "penalties" and provides that anyone violating any provision of "this part" shall be fined $1,000 or imprisoned thirty days, or both. Section 3116 is captioned "Forfeitures and Seizures", and makes it unlawful to have or possess any liquor or property intended for use in violating the provisions of "this part". The Court agreed with the Government that the two sections should be read together so that the acts proscribed by Section 3116 may not only result in forfeiture of the property but are also made criminal offenses, punishable under Section 3115. The Court relied upon the interpretations of Sections 25 and 29 of the National Prohibition Act of 1919, from which Sections 3116 and 3115 were borrowed, and also gave weight to a clause of Section 3116 which provides that "Nothing in this section shall in any manner limit or affect any criminal . . . provision of the internal revenue laws".

A dissenting opinion by Mr. Justice BLACK, in which Mr. Justice DOUGLAS, Mr. Justice JACKSON and Mr. Justice MINTON concurred, argued that Section 3115 does not of itself define any crime, and merely authorizes a fine or imprisonment for violations of other provisions, so that it does not apply to Section 3116 because the latter prescribes its own special penalty—seizure and forfeiture of the property.

Philip Elman argued the case for the United States.

JURY

Exclusion of Persons of Mexican Descent from Jury Service

■ *Hernandez* v. *Texas*, 347 U. S. 475, 98 L. ed. (Advance p. 573), 74 S. Ct. 667, 22 U. S. Law Week 4235. (No. 406, decided May 3, 1954.) *Judgment of the Texas Court of Criminal Appeals reversed.*

The systematic exclusion of persons of Mexican descent from jury service in a Texas county here resulted in the reversal of a murder conviction.

Hernandez was convicted of the murder of one Espinosa by a Jackson County court. Alleging that persons of Mexican descent were systematically excluded from service as jury commissioners, grand jurors and petit jurors, petitioner established the facts that 14 per cent of the population of Jackson County were persons with Latin American surnames and that 11 per cent of the

males over 21 bore such names. The state stipulated that "for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County".

A unanimous Supreme Court reversed the conviction, speaking through the CHIEF JUSTICE. The Court refused to accept the state's contention that there are only two classes—white and Negro—within the contemplation of the Fourteenth Amendment. The Court said ". . . community prejudices are not static, and from time to time other differences from the community may define other groups which need the same protection. Whether such a group exists within a community is a question of fact." The petitioner had met the initial burden of demonstrating that persons of Mexican descent constitute a separate class in the county, the Court held, by showing that persons of Mexican descent participated only slightly in business and community affairs, that they were required to attend segregated schools and that at least one restaurant displayed a sign "No Mexicans Served". The Court denied that its decision revived the contention that the Fourteenth Amendment requires proportional representation on juries of all the component ethnic groups of the community.

The case was argued by Carlos C. Cadena for petitioner and by Horace Wimberly for respondent.

PHYSICIANS AND SURGEONS

Suspension of Physician's License After Conviction for Refusal To Produce Records Before Congressional Committee

■ *Barsky* v. *Board of Regents of the University of the State of New York,* 347 U. S. 442, 98 L. ed. (Advance p. 545), 74 S. Ct. 650, 22 U. S. Law Week 4223. (No. 69, decided April 26, 1954.) *Judgment of the New York Court of Appeals affirmed.*

Suspension of a New York physician's license to practice was upheld here following his failure to produce papers subpoenaed by a committee of Congress. The suspension was ordered by the Board of Regents acting under a New York statute permitting discipline of doctors "convicted in a court of competent jurisdiction, either within or without this state, of a crime. . . ."

Barsky, a licensed physician, had been national chairman of the Joint Anti-Fascist Refugee Committee, an organization listed as subversive by the Attorney General. Barsky refused to produce the Committee's records in a hearing before a congressional committee investigating Communist and other subversive organizations. This led to his conviction in a federal court of violation of R. S. § 102, as amended, 2 U. S. C. § 192. He served a jail sentence and paid a fine. His six months' suspension followed after hearings before a committee of doctors in New York. Appellant contended that the New York statute under which the Board of Regents acted was void for vagueness.

Speaking for the Court, Mr. Justice BURTON found no infirmity in the state act. While the provision is broad, the Court admitted, the professional standard it requires is clear and well within the police power of the state. The validity of the statute was said not to be affected by the facts that Barsky's conviction was of a crime in a foreign jurisdiction and one that did not involve moral turpitude. The Court declared that the statute was readily distinguishable from one that would require automatic termination of a professional license. The Court also rejected an argument that the suspension was a violation of due process, saying that there was no indication that the Board had acted arbitrarily, capriciously or through prejudice.

Mr. Justice BLACK, joined by Mr. Justice DOUGLAS, wrote a dissenting opinion which took the position that the Attorney General's list of subversives, used in evidence against Barsky, constituted an attainder, and that the New York statute permitted his trial by an agency with intermingled legislative, executive and judicial powers so broad and ill-defined as to confer arbitrary power.

Mr. Justice FRANKFURTER wrote a dissenting opinion in which he expressed the view that due process was denied, since the New York Court had declared itself to be without jurisdiction to review certain aspects of the Board's action and no court had passed on those aspects.

Mr. Justice DOUGLAS, in a dissent in which Mr. Justice BLACK joined, declared that Barsky had been suspended because he held unpopular opinions. His only crime, the opinion declared, was a "justifiable mistake" concerning his constitutional rights.

The case was argued by Abraham Fishbein for appellant and by Henry S. Manley for appellee.

STATES

Use of Word "Savings" by National Bank in Violation of State Law

■ *Franklin National Bank* v. *New York,* 347 U. S. 373, 98 L. ed. (Advance p. 465), 74 S. Ct. 550, 22 U. S. Law Week 4179. (No. 427, decided April 5, 1954.) *Judgment of the New York Court of Appeals reversed and remanded.*

A New York statute that prohibits national banks from using the word "saving" or "savings" in their advertising or business is incompatible with the Federal Reserve Act which authorizes national banks "to receive time and savings deposits".

The purpose of the New York statute was to foster the mutual savings bank, a nonprofit institution whose earnings inure to the benefit of depositors rather than to stockholders. The New York Banking Law forbids the use of the word *savings* by any banks other than mutual savings banks or savings and loan associations. The Franklin National Bank used the word *savings* in advertising and in its deposit and withdrawal slips and the state obtained an injunction to prohibit the practice. The state contended that the use of the word *savings* was a misnomer because New York depositors had come to think of savings accounts as the

kind of accounts offered by the mutual banks.

Speaking for the Supreme Court, Mr. Justice JACKSON held that there was a conflict between the New York statute and the Federal Reserve Act and that, under the circumstances, the state act was invalid. The Court relied upon the language of the Federal Reserve Act which authorizes national banks "to receive time and savings deposits" and its inability to find any indication that Congress intended to subject this phase of national banking to local restrictions.

Mr. Justice REED, in a dissenting opinion, argued that the Court's opinion permitted the national banks to "trade upon the good name of the savings banks". "I would not imply a federal privilege to use 'savings' in advertising from the fact that national banks may accept savings deposits" he declared.

The case was argued by Samuel O. Clark, Jr., for appellant, by Daniel M. Cohen for appellee, and by Solicitor General Sobeloff for the United States as *amicus curiae,* urging reversal.

STATES

Validity of New York Harbor Compact

■ *Linehan* v. *Waterfront Commission of New York Harbor, Staten Island Loaders, Inc.* v. *Waterfront Commission of New York Harbor,* 347 U. S. 439, 98 L. ed. (Advance p. 538), 74 S. Ct. 623. (Nos. 557 and 558, decided April 12, 1954.) *Judgment of the United States District Court for the Southern District of New York affirmed.*

This case was brought before the court on direct appeal from the District Court. The Court granted motions to affirm *per curiam* without opinion.

In a dissenting opinion in which Mr. Justice BLACK joined, Mr. Justice DOUGLAS declared that the case was an illustration of a growing practice of "diluting" the act of Congress that gives the Court jurisdiction of appeals. The case dealt with a compact between New York and New Jersey on the regulation of employment of longshoremen at New York Harbor. The compact provided that the Commission "may in its discretion" deny a longshoreman the right to register for work if he has been convicted of a crime or is a Communist. The opinion argued that the validity of these provisions, affecting the longshoreman's "right to work", was a substantial question that deserved a full statement of the Court's action.

WORKMEN'S COMPENSATION

Meaning of "Widow" in Longshoremen's and Harbor Workers' Compensation Act

■ *Thompson* v. *Lawson,* 347 U. S. 334, 98 L. ed. (Advance p. 461), 74 S. Ct. 555, 22 U. S. Law Week 4201. (No. 352, decided April 5, 1954.) *Judgment of the United States Court of Appeals for the Fifth Circuit affirmed.*

The question before the Court here was the meaning of *widow* as used in the Longshoremen's and Harbor Workers' Compensation Act.

Otis Thompson died of injuries suffered while loading a ship for his employer. Two women sought a death benefit under the statute, each claiming to be his widow. The Deputy Commissioner of the Bureau of Employees Compensation found that Otis and Julia Thompson were married in 1921 and lived together as husband and wife until 1925, when Otis deserted her. He contributed nothing after that time to the support of Julia or her children. In 1929, Otis went through a marriage ceremony with one Sallie Williams. In 1940, Julia "married" one Jimmy Fuller, whom she formally divorced in 1949. The Deputy Commissioner held that neither woman was entitled to any benefit under the statute on the ground that Sallie was not Otis's lawful wife, while Julia was not living apart from him at the time of his death "by reason of his desertion". The District Court sustained the Deputy Commissioner and the Court of Appeals affirmed.

The opinion of the Supreme Court, by Mr. Justice FRANKFURTER, held that Julia's marriage to Fuller in 1940 severed all meaningful relationships with the decedent so that she was not his widow in the statutory sense. The Court emphasized the fact that state domestic relations law was irrelevant, since Congress had defined the requirements that every claimant under the act must meet.

Mr. Justice BLACK, joined by Mr. Justice DOUGLAS and Mr. Justice MINTON, dissented on the ground that, in making his findings the Deputy Commissioner had felt himself bound by holdings of the Fifth Circuit that an attempted remarriage by a wife bars her recovery as a matter of law. The dissenting opinion maintained that the cause should have been remanded to the Deputy Commissioner to decide, "free from judicial compulsion", whether Julia's living apart from Otis was for "justifiable cause" or because of his "desertion".

The case was argued by David Carliner for petitioner, by George W. Ericksen for Gulf Florida Terminal Co., Inc., respondent, and by Lester S. Jayson for the Deputy Commissioner.

What's New in the Law

The current product of courts, departments and agencies

George Rossman • EDITOR-IN-CHARGE
Richard B. Allen • ASSISTANT

Bar Association . . . proposed listing as subversive

■ The National Lawyers Guild has been successful in the Court of Appeals for the District of Columbia Circuit in obtaining a preliminary injunction barring the Attorney General from proceeding with an administrative hearing to determine whether the Guild should be listed as a subversive organization under existing executive-order procedure.

The Guild's complaint attacked as unconstitutional both the executive order [No. 10450, issued in April of 1953] and the procedural rules adopted by the Attorney General for its implementation. Among the allegations was that the Attorney General in two public addresses had indicated that he had prejudged the case. One of these addresses was made to the Assembly of the American Bar Association on August 27, 1953, in Boston, at the Association's Annual Meeting.

In a short *per curiam* opinion the Court said that "we are of the opinion that the interests of justice would be served best in this matter if the administrative hearing were held in abeyance pending the judgment of the district court" on the constitutional issues. The Court did not feel, however, that an injunction was required, until ultimate disposition of the case, including possible appeals, and suggested to the district court that "public interest would be served if this action could be heard and determined at an early date".

One judge dissented on the ground that the Court should not have reversed the district court's refusal to grant the preliminary injunction unless the action of the lower court was clear error or an abuse of discretion. He said that even granting the claim of the Guild that it had been damaged by the Attorney General's public statements, the "claim of irreparable injury presently made is chimerical". Too, the dissenting judge thought that the administrative process should not be interdicted, but should be allowed to run its course.

(National Lawyers Guild v. *Brownell, Jr.,* C.A.D.C., May 4, 1954, *per curiam.)*

Criminal Law . . . radar speed detectors

■ The evidence of police-operated radar speed-detecting devices is beginning to stand up in New York courts, now that expert testimony relating to the operation and accuracy of the machines is being used.

In the first case involving the electronic devices, *People* v. *Offermann,* 125 N.Y.S. 2d 179 (digested in 40 A.B.A.J. 150; February, 1954), the Supreme Court of Erie County reversed a conviction where the only evidence as to speed came from the radar device and there was no evidence to show whether it was working correctly. Later the Monroe County Court in *People* v. *Torpey,* 128 N.Y.S. 2d 864, had before it an arrest and subsequent conviction made by a radar unit of the Rochester police, but since the policemen were able to testify of their own knowledge that the motorist was exceeding the speed limit, the court did not have to consider the radar evidence standing alone.

Now in two recent cases courts have accepted the evidence of the radar units as conclusive. In both cases an expert from Johns Hopkins University testified, detailing the construction, theory and use of the devices. And in both instances the courts held that this removed the cases from the *Offermann* rule and established the radar units as accurate indicators of speed.

(People v. *Katz,* Ct. Spec. Sess., Yonkers, March 6, 1954, Fiorillo, J., 129 N.Y.S. 2d 8, and *People* v. *Sarver,* Ct. Spec. Sess., New Rochelle, March 31, 1954, Kennedy, J., 129 N.Y.S. 2d 9.)

Descent and Distribution . . . double killing

■ Where a husband and wife are tenants by the entirety and the husband kills his wife and then himself, the jointly-held property is properly divided one half to the wife's heirs and one half to the husband's heirs. This is the decision of the Court of Appeals of Kentucky on a sticky point on which not all courts are in agreement.

Kentucky has a statute barring the taking of property by one who "takes the life of the decedent and is convicted therefor of a felony. . . ." One set of heirs argued that the statute was not applicable because the husband had not been "convicted", while the other set contended that the law applied since the "conviction" was prevented only by the unlawful act itself.

The Court in effect avoided application of the statute by ruling that in a joint tenancy one must be a survivor not only in fact but in contemplation of law in order to be vested with title. Thus, the Court said, neither the husband nor the wife survived the other in contemplation of law.

But, the Court continued, the

Editor's Note: **Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.**

Kentucky statute does not bar the innocent heirs of the killer, even assuming he survived in the present case, but precludes only the wrongdoer himself from taking. Thus the husband's heirs were properly entitled to one half the property, the Court decided.

(Cowan et al. v. *Pleasant et al.,* Ct. App. Ky., November 20, 1953, as extended on denial of rehearing January 20, 1954, Cammack, J., 263 S.W. 2d 494.)

Labor Law . . . action for damages under Taft-Hartley

■ The Court of Appeals for the Fourth Circuit has held that the Taft-Hartley Act restores the common-law meaning of agency to labor law, but has at the same time reversed a jury award for damages against the United Mine Workers in a suit under §303 (b) of the Act [29 U.S.C.A. §187 (b)] because the trial court allowed punitive damages and permitted prejudicial testimony to be introduced.

The basis of the suit was that the union conducted strikes and brought threatened-strike pressure on a large coal company to refuse a promised lease to a small company of a portion of the larger's coal fields, which action, it was alleged, drove the small company out of business. The jury awarded the plaintiffs $150,000 actual damages and $75,000 punitive damages.

One of the union's defenses was that there was no evidence that the union authorized or ratified the strikes. In this respect the union relied on §6 of the Norris-LaGuardia Act [29 U.S.C.A. 106] which provides that a union shall not be responsible for the unlawful acts of individual officers or members "except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof".

The Court ruled that it was clear, however, that Taft-Hartley expressly abrogated that rule in regard to suits under the Act. Taft-Hartley provides [29 U.S.C.A. 185(e)] that "in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling". This clause and the legislative history of the Act, the Court said, show "that the intent of Congress was to apply to suits of this character the common law rules with respect to liability for acts of agents".

Continuing its examination of the legislative history of the Act, the Court found that there was no provision for the award of punitive damages in suits under §303 (b), and declared that it would not be justified in construing the Act to permit such a recovery.

The Court also ruled that prejudicial error resulted from the allowance by the trial court of testimony relating to an attempt to dynamite the plaintiffs' tipple and the actual dynamiting of the tipple of another non-union mine, where there was no evidence, circumstantial or otherwise, to connect these incidents to the union.

(United Mine Workers of America et al. v. *Patton et al.,* C.A. 4th, March 15, 1954, Parker, C.J., 211 F. 2d 742.)

Municipal Corporations . . . crime investigating committees

■ Municipally-created crime investigating committees in New Jersey and Illinois have survived ramified constitutional and legal challenges.

In the New Jersey case, the Board of Commissioners of Jersey City established by resolution an investigating committee consisting of three city commissioners. The committee served a subpoena on a fellow city commissioner and he brought an action to quash the subpoena.

The Court turned down the argument that the committee was unconstitutionally doing business because it was investigating alleged violations of the criminal laws and thus was trespassing on the province of courts and grand juries. Arraying an impressive list of authorities and detailing much historical background about legislative investigations, the Court held that such an investigation had enough relationship to the legislative function of the city government to be valid, and the fact that it might disclose crime or wrongdoing did not obfuscate the essential legislative function or constitute an infringement of the powers of courts and grand juries.

To make such a determination the Court was constrained to overrule specifically the New Jersey law created by the so-called second Hague case, *In re Hague,* 123 N.J. Eq. 475, in which the state's old Court of Errors and Appeals had struck down a joint legislative investigating committee on the ground that "investigations of alleged violations of the criminal law are strictly judicial in their nature" and outside the scope of the legislative branch.

Getting rid of the second Hague case, the Court said, would give the state "the important public benefits of the doctrine that a legislative body may conduct an inquiry in aid of its proper legislative functions even though the subject of the inquiry may also be the proper concern of courts and grand juries in their enforcement of the criminal laws".

The Court also rejected the contention of the commissioner that he was immune from interrogation because of his position as a member of a co-ordinate branch of government. The Court declared that the separation of powers doctrine did not apply to municipalities.

The aggrieved commissioner also charged that the committee was motivated by political purposes to defame him. But the Court said that it must assume that the committee was acting in good faith, and declared that since the committee was investigating for a legitimate public end, it was immaterial that political motivation might also be present.

Two judges dissented on the ground that the reasonableness of the committee's inquiry should be first established, since it appeared

that another investigation was also being conducted in the city.

(Eggers v. *Kenny et al.,* Sup. Ct. N.J., March 29, 1954, Jacobs, J., 104 A. 2d 10.)

■ In the Illinois case an emergency committee on crime was formed by resolution of the city council of Chicago. After the committee had received some testimony indicating open crime conditions in a certain police district, it called the police captain of the district. He answered some questions, but refused to answer—in public at least—whether he had received any income in excess of his salary from any source from 1948 to 1952. Although the captain originally stated he would answer that question to the committee's counsel in private, the complaint alleged that he later refused to answer in a committee executive session.

The state legislation under which the council had formed its committee was attacked as being a special or local law applying to Chicago alone and therefore a contravention of the Illinois Constitution. But the Court held that the legislature had made a reasonable classification in allowing only Chicago to establish such a committee, since there was a vast difference between Chicago and downstate cities in the ability of aldermen to determine the manner in which city departments operated.

As in the New Jersey case, it was contended that it was not a valid legislative function to investigate crime. But the Court gave this argument short shrift and stated that the "very existence of a legislative body implies the power to investigate via committees of its members into those affairs with respect to which it may legislate or appropriate funds". The Court further noted that the police department was a creature of the council.

Turning to the captain's claim of a "right of privacy" not to answer the particular question, the Court held that as long as the question was pertinent to the inquiry, there was no inherent "right of privacy" to refuse to answer, except upon claim of the privilege against self-incrimination.

(DuBois v. *Gibbons,* Sup. Ct. Ill., March 17, 1954, Fulton, J., 118 N.E. 2d 295.)

Public Lands . . . payments due local counties

■ The Court of Appeals for the District of Columbia Circuit has directed the district court to issue a mandamus to the Secretary of the Interior and an injunction against the Secretary of Agriculture in order to effectuate compliance with certain statutes and a 1925 court decision directing the payment to eighteen Oregon counties of a share of funds realized from the sale of timber from public lands in the state.

In 1866 and 1869 the Congress made grants of public lands to a railroad in Oregon. Later, however, when the railroad had violated provisions regarding resale of the land, the Congress in 1916 enacted legislation revesting title in the United States, and, under a decision of the Supreme Court, caused a suit to be commenced in the United States District Court for the District of Oregon to determine what lands were involved in the revesting and to what compensation the railroad was entitled. The decree in this suit was entered in 1925 and found that the land involved in the present proceeding had been granted to the railroad.

By enactments in 1926 and 1937, the Congress required the Secretary of the Interior to pay taxes to the counties in Oregon and Washington on the revested lands as though the land had remained privately owned and also directed him to manage the land for permanent forest production and to deposit all money received from sale of timber in a special account in the Treasury.

The provisions of these statutes were not complied with, no special fund was established, and no disbursements were ever made to the local counties.

The Court held that the revesting act of 1916 was clear and that the district court's decision of 1925 had held that the land in question was revested and thus subject to the act. The Court further ruled that the provisions of the 1926 and 1937 acts had not been followed and that the Oregon counties were entitled to an injunction and a mandamus to effectuate payment of the timber money due them.

The contentions of the secretaries that sovereign immunity barred the suit and that mandamus would not lie were rejected. The Court said that "possible philosophical justification for a doctrine of sovereign immunity in our concept of government is a tempting topic for inquiry", but that the law was well settled that mandamus was a proper remedy against a governmental official to require the performance of a ministerial act and that the acts requested in the instant case were ministerial.

The Court also rejected the contention that the action was one against the United States and that it therefore was an indispensable party.

(Clackamas County, Oregon v. *McKay et al.,* C.A. D.C., April 30, 1954, Prettyman, J.)

Selective Service . . . examination of registrant's FBI file

■ A local draft board's refusal to allow a draft registrant's attorney to examine a complete FBI report on the registrant which inadvertently had been forwarded to the local board has resulted in the Court of Appeals for the Fourth Circuit reversing the registrant's conviction for refusal to submit to induction.

Normally in the processing of a draft registrant's appeal as to classification, the state appeal board, following its determination, forwards the registrant's file to the Department of Justice, which orders an FBI investigation of the registrant and provides a hearing before a hearing officer who returns his recommendation to the state board along with a résumé of the FBI report. In the present case, however, the complete report, rather than a résumé, was returned to the state appeal board

and subsequently to the local board, and both boards had the complete file before them when they classified the defendant 1-A. The local board refused to allow the registrant's attorney to examine the FBI report.

The Court held that since the state and local board had examined the complete FBI report, it was denial of due process to withhold it from the registrant. The Court distinguished *U. S.* v. *Nugent*, 346 U.S. 1, in which the Supreme Court held that a registrant was not entitled to examine his FBI file in the hearing before the Justice Department hearing officer, on the ground that the Department's function is advisory only, whereas the state and local boards make a final determination in which "all the safeguards of justice and due process" should be present.

(*Brewer* v. *U. S.*, C.A. 4th, April 5, 1954, Dobie, J.)

Taxation . . . amortization of cost of life estate

■ The Court of Appeals for the Seventh Circuit has held that a taxpayer may amortize the cost of the purchase of life estates over the life expectancies, even though the taxpayer-purchaser was also the sole remainderman.

The Government conceded that a life estate is a capital asset and that its cost to a purchaser may be amortized, but it contended that where the purchaser is also the owner of the remainder, a merger results which destroys the life estate, thus leaving nothing to amortize.

The Court found little compelling authority on the point but observed that the situation was closely analogous to the purchase by a lessor of an oustanding lease term in his own property. In those cases lessors have been allowed to amortize the cost of purchasing the unexpired term. Here the Court felt that the same reasoning should apply: that the taxpayer acquired a capital asset wasting in value with time and that he should be allowed to recover his capital expenditure, regardless of the coincidence that he was also remainderman.

(*Bell* v. *Harrison*, C.A. 7th, April 27, 1954, Major, C.J.)

Taxation . . . self-employment tax

■ The Court of Appeals for the Fifth Circuit has held against a constitutional challenge to inclusion of self-employed persons in the social security system by the exaction of a tax on self-employment earnings.

The Government contended that the issue had been decided by the social security cases, *Steward Machine Co.* v. *Davis*, 301 U.S. 548, and *Helvering* v. *Davis*, 301 U.S. 619, and the recent decision of the Fifth Circuit itself in *Abney* v. *Campbell*, 206 F.2d 836, *cert. den.* 74 S.Ct. 311.

But the Court said that those decisions held that social security taxes when applied to employers were excise taxes constitutionally laid by the Congress. Here, the Court pointed out, the objection was raised not by an employer, but an employee. Nevertheless, the Court continued, the Congress may in imposing income taxes distinguish between earned and unearned income and between income from various kinds of property and occupations, and that consequently it may impose an additional income tax on self-employed persons, just as it has for many years imposed such a tax on incomes of persons not self-employed.

(*Cain et al.* v. *U.S.*, C.A. 5th, March 19, 1954, Hutcheson, C.J., 211 F. 2d 375.)

Workmen's Compensation . . . casual employment

■ The custom in some trades of acquiring casual day work through labor unions has brought about an unfavorable result to a New York painter.

In order that an employee may receive disability benefits, the New York statute requires that the employee must work for "a covered employer for four or more consecutive weeks. . . ." The painter got his jobs through his labor union, but occasionally did independent contracting. It was conceded that he had not worked for four consecutive weeks prior to his disability, but he contended that he was "in employment" for that period, since he was available for work in accordance with the custom and practice of his trade.

But the Court, with two judges dissenting, held that "consecutive" meant an unbroken sequence of four weeks, and nothing else. To the argument that such an interpretation deprived large groups of day workers for different employers from the benefits of the act, the Court replied: "Such results are unfortunate, but they do not change the plain meaning of plain words, or confer legislative powers on the board or the courts." The Court further refused to construe exactly an administrative regulation regarding casual employment, on the ground that the regulation could not under any circumstances be held to contravene the plain meaning of the statute.

(*Russomanno* v. *Leon Decorating Co.*, C.A. N.Y., April 22, 1954, Desmond, J., 119 N.E. 2d 367.)

Workmen's Compensation . . . course of employment

■ In two recent cases the New York Supreme Court, Appellate Division, Third Department, has considered that ever-present element in workmen's compensation law: whether the injury arose out of and in the course of employment.

In one case a policeman returning to his home after an eight-hour tour of duty stumbled over a curbing and broke his leg. He maintained that since under department rules and regulations he was considered on duty and call twenty-four hours a day, his injury arose out of and in the course of his employment.

Not so, the Court held. Such a construction, the Court felt, would turn any injury the policeman received into one in the course of his employment. The general New York rule, the Court said, was that the injury must be received while a workman is doing some duty he is employed to perform.

The Court also declared that the

rule that an outside worker who has no fixed place of employment is covered from the time he leaves home until he returns did not apply. Here, the Court stated, the employee checked in and out at the station house, and that circumstance governed the course of employment.

(*Blackley* v. *City of Niagara Falls,* N.Y. S.C., App. Div., 3d Dept., April 24, 1954, *per curiam,* 130 N.Y.S. 2d 77.)

■ In another case a longshoreman had checked out from the pier where he had finished his work shift. About a block away he was struck and seriously injured by one of his employer's trucks.

The state board entered this case on its own motion, since the employee did not file a claim. The board found and the Court affirmed that this injury occurred out of and in the course of employment. The Court said that neither the precise hours of work nor the precise bounds of the employer's usual activities are controlling. About the employer's plant, the Court observed, there is a "penumbra within which falls the shadow of employment", and here the employee was within that area.

The employee was resisting a finding that he was injured out of and in the course of his employment because he was suing the employer in a common-law negligence action. Under New York law the award of compensation is an exclusive remedy for any injury arising out of employment.

(*Doca* v. *Federal Stevedoring Company Inc.,* N.Y. S.C. App. Div., 3d Dept., April 24, 1954, Imrie, J., 130 N.Y.S. 2d 172.)

What's Happened Since . . .

■ On April 12, 1954, the United States Supreme Court:

DENIED CERTIORARI in *Farmer* v. *United Electrical, Radio and Machine Workers,* 211 F.2d 36 (digested in 40 A.B.A.J. 151; February, 1954), leaving in effect the decision of the Court of Appeals for the District of Columbia Circuit that the National Labor Relations Board has no power to inquire into the truth or falsity of non-Communist affidavits required to be filed with it by officials of a union under the Taft-Hartley Act.

DENIED CERTIORARI in *Shirks Motor Express Corp.* v. *Messner,* 375 Pa. 450 (digested in 40 A.B.A.J. 324; April, 1954), leaving in effect the decision of the Supreme Court of Pennsylvania that Pennsylvania's excise tax on an interstate motor carrier's gross receipts attributable to miles operated in the state, even though no part of the tax proceeds are earmarked for highway purposes, is constitutional.

DENIED CERTIORARI in *Baltimore & Ohio Railroad Co.* v. *Johnson,* 208 F. 2d 633 (digested in 40 A.B.A.J. 233; March, 1954), leaving in effect the decision of the Court of Appeals for the Third Circuit that a plaintiff's jury verdict in a wrongful death action was not invalidated because the plaintiff called the only witness of the accident, an employee of the defendant, who gave testimony favorable to the defendant, but who was apparently not believed by the jury. The Court had explicitly disclaimed the evidence rule that one who calls a witness is bound by, or vouches for, the witness' veracity.

■ On April 26, 1954, the United States Supreme Court:

AFFIRMED (6-to-3, with opinion by MR. JUSTICE BURTON) the decision of the New York Court of Appeals in *Barsky* v. *Board of Regents,* 305 N.Y. 89 (digested in 39 A.B.A.J. 598; July, 1953), that the suspension of a physician's license to practice because he had been convicted of contempt for failure to produce records before a congressional committee in response to a subpoena was not unconstitutional.

■ On April 23, 1954, the New York Court of Appeals affirmed the decision of the Supreme Court, Appellate Division, First Department in *Holland* v. *Edwards,* 122 N.Y.S. 2d 721 (digested in 39 A.B.A.J. 914; October, 1953), that certain questions posed in an employment agency questionnaire and also asked in an interview contravened the state's anti-discrimination (fair employment practices) law, and that a mandatory order of the state's Commission Against Discrimination was a reasonable effectuation of the statute's purpose.

■ On December 9, 1953, the Court of Appeals for the Fourth Circuit [208 F. 2d 796] affirmed the decision of the Tax Court in *Marriner S. Eccles,* 19 T.C. 1049 (digested in 39 A.B.A.J. 505; June, 1953), that under a Utah interlocutory divorce decree the taxpayer and his wife were entitled to file a joint income tax return for the taxable year ending prior to the date upon which the divorce became final.

■ On March 13, 1954, the Court of Appeals for the Tenth Circuit [211 F. 2d 378] affirmed the decision of the Tax Court in *Alice Humphreys Evans,* 19 T.C. 1102 (digested in 39 A.B.A.J. 505; June 1953), that under a Colorado interlocutory divorce decree temporary alimony payments made to the wife prior to the date upon which the divorce became final were not taxable income to the wife under IRC §22 (k).

■ On January 13, 1954 (rehearing denied February 10, 1954), the Supreme Court of Texas [263 S.W. 2d 935] reversed the decision of the Court of Civil Appeals in *Boyles* v. *Gresham,* 260 S.W. 2d 144 (digested in 39 A.B.A.J. 1007; November, 1953), which had held that an unusual holographic will was not entitled to probate because it made no disposition of the testator's estate. The odd instrument involved is given in full in the November, 1953, JOURNAL as indicated above. The Court ruled that, while the will was too vague and indefinite to dispose of property, it was sufficiently clear to appoint executors and that under Texas law a properly executed instrument appointing an executor is a will and entitled to probate even though it makes no effective disposition of property.

■ On March 8, 1954, the Supreme Court of New Jersey [103 A. 2d 256] considerably restricted the scope of injunctive relief granted by the Superior Court, Chancery Division, in *Bantam Books, Inc.* v. *Melko,* 24 N.J. Super. 292 (digested in 39 A.B.A.J. 598; July, 1953), in which the court enjoined a county prosecutor from exercising what it called censorship powers through a citizens committee to which books purchased by the prosecutor's staff were submitted for evaluation as to objectionable material. The Supreme Court altered the order to protect only one book, which had been found by the lower court not to be criminally obscene, but by excising the remainder of the decree apparently left the way clear for the prosecutor to continue his previous course of action.

■ On May 17, 1954, the United States Supreme Court:

DENIED CERTIORARI in *National Maufacturing Co.* v. *U. S.,* 210 F. 2d 263 (digested in 40 A.B.A.J. 423; May, 1954), leaving in effect the decision of the Court of Appeals for the Eighth Circuit that the United States is not liable under the Federal Tort Claims Act for damage caused by flood waters to private property owners who relied upon Weather Bureau predictions that there would be no flood.

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Harry K. Mansfield, Chairman.

The Lawyer's Deduction for Entertainment of Clients

■ Upon completion of the unhappy job of preparing his personal income return, the average lawyer is firmly convinced that the deduction he has claimed for "Gifts and Entertainment of Clients" is substantially below the amount actually expended. Generally, however, there is the feeling on his part that to claim a greater amount would be unprofessional and reduce his social relations with friends, clients and potential clients to an exclusively "dollar-and-cents" basis.

Convinced that he has thus overpaid his taxes, the lawyer may become indignant when, upon audit, an internal revenue agent demands substantiation of the exact amounts claimed to have been spent in entertaining clients. If the agent insists on a reduction of the estimated expenditures, the lawyer feels that he has been unfairly treated. But the recently expressed attitudes toward entertainment costs on the part of the Internal Revenue Service and the Tax Court are portents that many claimed expenditures may be disallowed in the future.

Commissioner of Internal Revenue Andrews' statements on entertainment costs, travel expenses, club dues and similar deductions have been widely publicized. The boast of some business executives that they "live on an expense account" will unquestionably be muted. Revenue agents are making a diligent search for evidence of personal expenditures being charged off as business expenses—and the search will not be limited to commercial businesses. Professional men, too, have sometimes abused their rights in this respect, and can expect a close scrutiny of debatable items. Particularly vulnerable will be excessive automobile expenses written off when the same car is used for both business and personal purposes and travel costs incurred in going to well-known resort areas if the connection with the taxpayer's business is rather remote. Full and adequate records will be the only way to convince a revenue agent of the correctness of the deductions.

The same conclusion must be reached with respect to entertainment and gift deductions. Records must be available to indicate the connection of the expenditure with the production—or anticipated production—of income. If the daughter of a valued client marries, certainly the cost of a wedding present is deductible. If a new business executive moves to the lawyer's community, is entertained several times by him, and then retains the lawyer as his counsel, there is justification for deducting the entertainment costs. If a lawyer never uses a club for his personal enjoyment, but goes there only when he entertains clients, the dues will probably qualify as a business deduction. This is particularly true in the case of a downtown men's club. But in each case the taxpayer must be prepared to prove the basis of his claim. The only way he can produce satisfactory proof is to have current records which accurately indicate names, dates and amounts.

Supplementing the more careful attention being given by examining agents to possible personal expenses masquerading as business deductions, the Tax Court has, for the first time, set forth a principle which, if generally adopted, will have the effect of reducing every allowable entertainment expense. See *Richard A. Sutter,* 21 T.C. No. 20 (1953). The Court stated the problem in this way:

> When a taxpayer in the course of supplying food or entertainment or making other outlays customarily regarded as ordinary and necessary includes an amount attributable to himself or his family such as the payment for his own meals, is that portion of the expenditure an ordinary and necessary business expense on the one hand or a nondeductible personal item on the other?

Judge Opper, speaking for a unani-

mous court, formulated a general principle to answer the question:

> The cost of meals, entertainment, and similar items for one's self and one's dependents . . . are ordinarily and by their very nature personal expenditures forbidden deduction by Section 24 (a)(1) [of the Internal Revenue Code]. The presumption, no doubt rebuttable, must accordingly arise that such costs are nondeductible.

The opinion then went on to say that if the taxpayer could produce "clear and detailed evidence as to each instance that the expenditure in question was different from or in excess of that which would have been made for the taxpayer's personal purposes", then the presumption would be overcome. For example, Dr. Sutter (the taxpayer) had attended Chamber of Commerce luncheon meetings. He did not prove that he spent any more for his lunch on such occasions than he would have spent had he not attended the meeting. Therefore no deduction was allowed.

Such a criterion can lead to rather absurd results as well as to unwarranted inquiries. There is little justification for the position that a man who customarily eats a light lunch should have the benefit of a greater deduction than a man whose usual fare is much larger, if both of them spend the same amount of money in taking a client to lunch. The Court itself recognized one exception to its new rule—expenses incurred away from home in pursuit of one's business. In other words, the full cost of taking a client to lunch in *his* home town (if it is far enough removed from your own) is deductible, but only a part of the cost of taking the same client to lunch in *your* home town is deductible. The oft-repeated assertion that taxation is eminently practical seems to have been abandoned! It might be preferable, though even more drastic, to determine what proportion of the party is made up of the taxpayer and his family, and then to disallow that same percentage of the total expense as a deduction. But neither this method nor the one adopted by the Tax Court will achieve general acceptance by taxpayers. As long as we have a tax system based on self-assessment, the rules ought to correspond as closely as possible to the average man's interpretation of common terms. Any undue refinements will hurt only the small minority whose returns are investigated, or those who are penalized because of the lack of geographical uniformity in enforcement.

The *Sutter* case enunciated another rather disturbing tax principle in connection with entertainment incidental to the carrying on of a profession. Dr. Sutter, who was engaged in the specialized practice of industrial medicine, was President of the St. Louis Medical Society and naturally was obligated to do a considerable amount of entertaining. He and his wife were hosts to other physicians and their wives as well as to clients and other persons who might assist in promoting his business accounts as an industrial physician. He owned an expensive cabin cruiser, and a considerable part of his entertaining was done on yachting trips. The Court listed several reasons why it could not allow the full amount of the deduction claimed on account of such entertainment costs. Some of the entertainment appeared to be purely social, with no thought of business advantages to be obtained; some of it, under the theory previously discussed, involved only the taxpayer and his family; and some of it was apparently "a means of enhancing petitioner's prestige and the future possibility of expanding his clinic business so as to be the means of creating a capital asset comparable to good will." The practical difficulties of classifying entertainment costs as either "ordinary and necessary business expenses" or "good-will expenditures" are almost insuperable, and the average professional man cannot reasonably be expected to accomplish the separation. Besides, there is no reason why good will and prestige cannot be built up by making a series of deductible expenditures, none of which should be capitalized. No one has suggested that a commercial enterprise must capitalize a part of its current expenses on the ground that it is gradually building up good will. Yet such an enterprise can, through its service and the quality of its merchandise, create good will which is considerably more marketable than the good will of a business wholly dependent upon the personal services of its owner. It is true that some definite tie-in of the expenditure with business matters should be insisted upon, so as to preclude, for example, a claim by a taxpayer that he joined a certain club "to enhance his prestige", even though he never met a client there. But if the business connection be established, there appears to be little reason to argue costs whether or not the expenditure should be classed as capital or current.

Still another aspect of the *Sutter* decision which is of interest to members of the legal profession related to claimed deductions for gifts to elevator operators, nurses' associations, hospital employees, parking lot attendants and gifts to medical associates. The Court held that the taxpayer had failed to prove a direct connection between these expenditures and his business, and disallowed the claim. Lawyers who find it helpful to keep in the good graces of various courthouse employees may find this conclusion somewhat unfortunate.

The amount of an individual lawyer's deduction for gifts and entertainment may be relatively small, and the problems involved are not of major significance. Yet the validity of deducting costs actually incurred for the entertaining of clients has not been questioned. The problem relates only to the size of the claim. But there is no rule of thumb as to a flat percentage of gross income which the Internal Revenue Service will pass as a business expense without question. There is no reason, however, why a lawyer should be less painstaking and assertive in obtaining evidence to support his own claims than he is in his efforts to substantiate the deductions of his clients.

Contributed by Committee member William E. Jetter

BAR ACTIVITIES

Paul B. DeWitt · Editor-in-Charge

■ A comprehensive tax institute will be sponsored by the Nebraska State Bar Association in Omaha on July 22, 23 and 24 and will consider the new Internal Revenue Code. Among the speakers on the institute program are Walter A. Slowinski, Washington, D. C., Secretary of the Section of Taxation of the American Bar Association; H. Cecil Kilpatrick, Washington, D. C., Former Chairman of the Section; Edward S. Cohen, New York City, an adviser on the American Law Institute's income tax project; and Mark H. Johnson, of the New York Bar. The speakers will divide the subject matter into five subjects: the history of the development and enactment of the new Code, changes affecting individuals, corporations and stockholders, partnerships and partners, income taxation of estates and trusts and estate and gift tax changes. The institute will be one of the first in the United States held for the purpose of considering the new law and will draw conferees from a ten-state area.

■ The Taxation Committee of the Detroit Bar Association is planning a series of institutes in cooperation with the Committee on Continuing Legal Education of the American Law Institute and the American Bar Association for the purpose of giving the general practitioner an opportunity to learn of the provisions of the Internal Revenue Code of 1954. The present plans call for a series of twelve lectures, one each week for twelve succeeding weeks.

■ The Annual Lawyers' Week of the Southwestern Legal Center was held during the week of April 19. It featured a variety of events starting with an institute on trial strategy. Leon Jaworski presided. Edward L. Wright, of Little Rock, spoke on the subject of "Presentation of the Evidence", and Judge R. B. Hudson, of Tulsa, treated the "Court's Charge and Jury Argument". A panel discussion completed the institute: panel members were Mr. Jaworski, Mr. Wright, Judge Hudson, Ross L. Malone, Jr., of Roswell, New Mexico, and former Governor Dan Moody, of Austin.

The second day was devoted to an institute on financing through the issuance of securities. The program was arranged by Alfred Hill, Associate Professor of Law, Southern Methodist University, and included speeches by Ralph Demmler, Chairman of the Securities and Exchange Commission; Philip L. West, Vice President of the New York Stock Exchange; Charles I. Frances, Vice President and General Counsel, Texas Eastern Transmission Corporation, Houston; William W. Werntz, New York City; Professor Lewis Loss, of Harvard Law School; and Talbot Rain, of Dallas.

The 1954 Conference on Law and Society was held on Wednesday on the theme, "Natural Law and Natural Rights". The speakers who considered this subject were: Alfred C. Outler, Professor of Theology, Southern Methodist University; Thomas S. K. Scott-Craig, Professor of Philosophy, Dartmouth College; Edwin W. Patterson, Cardozo Professor of Jurisprudence, Columbia University; and Alfred L. Harding, Professor of Law, Southern Methodist University.

The last two days of the Lawyers' Week were devoted to meetings of all types. Different groups considered subjects in the oil and gas field, taxation, insurance and labor law, among others. A reception was tendered for the members of the Texas Supreme Court and guests, at which Associate Justice Robert W. Calvert, of the Supreme Court of Texas, spoke. The concluding event of the week's social events was the annual banquet where Dr. Arthur S. Flemming, Director, Office of Defense Mobilization, made the principal address.

■ One of the highlights of the 78th annual meeting of the Illinois State Bar Association held in East St. Louis in May was the "Arbitration Workshop".

This workshop was under the joint auspices of the Labor Law Committee of the Missouri Bar Association and the Illinois State Bar Association. The speakers from Missouri included Professor Elmer Hilpert, Washington University Law School, M. O. Talent and John H. Martin, all of St. Louis.

Karl C. WILLIAMS

Speakers from Illinois were Director Robben W. Fleming, of the University of Illinois's Institute of Labor and Industrial Relations, Urbana; and Lester Asher, Chicago. Mr. Asher lectures at the University of Chicago and Roosevelt College.

Prior to the forum the Reverend Leo C. Brown, S. J., Director of St. Louis University Institute of Social Order, addressed the conferees on the subject "The Role of the Lawyer in Labor Relations".

Joseph C. Lamy, of Chicago, is Chairman of the Illinois State Bar Association's Section on Labor Law.

The Annual Dinner of the Illinois State Bar Association was addressed by Chief Justice Robert G. Simmons of the Nebraska Supreme Court who was sent by our State Department to India, Parkistan and Ceylon, and also previously to Indonesia, Burma and Japan. Major General Glenn O. Barkus, USAF, spoke to the assembled association members at a luncheon wherein he recounted some of his experiences in combat during the recent war in Korea.

New officers of the association are Karl C. Williams, *President;* Thomas S. Edmonds, *First Vice President;* James G. Thomas, *Second Vice President;* and Barnabas F. Sears, *Third Vice President.*

■ Allen T. Klots was elected President of The Association of the Bar of the City of New York at the Annual Meeting of the Association in May.

Allen T. KLOTS

Fabian Bachrach

Other officers elected were William E. Jackson, *Secretary;* George A. Spiegelberg, *Treasurer;* George W. Alger, Chauncey B. Garver, Benjamin A. Matthews, Carlyle E. Maw and James Garrett Wallace, *Vice Presidents;* and Robert M. Benjamin, Albert R. Connelly, Alexis C. Coudert and Harold M. Kennedy, *members of the Executive Committee.*

At the Annual Meeting, the Association approved by an overwhelming vote the report of the Committee on the Bill of Rights, George S. Leisure, Chairman, dealing with published comment on pending litigation. The report proposed an amendment to Section 20 of the Canons of Professional Ethics. In recommending an amendment to Canon 20, the Committee stated that it was not at this time proposing the precise language of the amended canon. Due to the advisability of having the Canons of Professional Ethics uniform throughout the country, or at the minimum uniform throughout the state and administered by the courts of the State of New York on a state-wide basis, it was the recommendation of the Committee that the American Bar Association and the New York State Bar Association co-operate with The Association of the Bar, to take appropriate action "looking toward the amendment of Section 20 of the Canons of Professional Ethics, to condemn as unprofessional press releases and public statements by lawyers, the publication of which may interfere with the fair trial in the courts or the due administration of justice, including statements of the nature referred to in the report of the Committee on the Bill of Rights submitted to this Association at this meeting".

The types of statements which the Committee indicated should not be originated by, or appear in the press or otherwise be published are as follows:

Those relating to criminal proceedings, include statements of any of the following:

(a) Any criminal record of the accused;

(b) Any alleged confession or admission of fact bearing upon the guilt of the accused;

(c) Any statement of any constituted authority as to the guilt of the accused;

(d) Any statement of his personal opinion as to the guilt of the accused;

(e) Any statement that a witness will testify to certain facts;

(f) Any comment upon evidence already introduced;

(g) Any comment as to the credibility of any witness at the trial; and

(h) Any statement of matter which has been excluded from evidence by the court at the trial.

In relation to civil proceedings, such types of statements include statements of any of the following:

(a) Any statement of his personal opinion as to the merits of the claims of the plaintiff or defendant;

(b) Any statement that a witness will testify to certain facts;

(c) Any comment upon evidence already introduced;

(d) Any comment as to the credibility of any witness at the trial; and

(e) Any statement of matter which has been excluded from evidence by the court at the trial.

In commenting editorially on the action taken by the Association, *The New York Times* stated, "Officials and lawyers have a right and a duty, in the public interest, to impose self-restraints that will protect civil liberties and fair trial. They are thus censoring themselves. The newspapers have an obligation, likewise in the public interest, to accept the the consequences of this act of conscience."

A pleasant and impressive feature of the Annual Meeting was the acceptance by the President of a portrait bust of John W. Davis which was presented to the Association by friends of Mr. Davis. The bust is the work of the well-known American sculptor, Miss Eleanor Platt. In accepting the bust, Bethuel M. Webster said in part: "Member of Congress from West Virginia, Solicitor General of the United States, Ambassador to the Court of Saint James, Master of the Bench of the Middle Temple, Doctor of Laws, President of the West Virginia Bar Association and of the American Bar Association, senior member of a famous partnership—an impressive list but a meager description of our former President, John W. Davis."

■ The Cleveland Bar Association sponsored an institute on damages in March under the chairmanship of Oliver Schroeder, Jr. The panel, which was composed of A. H. Dudnik, C. Craig Spangenberg, Leslie I. Ulich and S. Burns Weston, presented personal views on the questions of the value of a lawsuit, settlement price and jury verdict to be expected in actual cases from digests prepared for the use of the institute from actual cases. The afternoon session was led by Professor Judson A. Crane, of the University of Pittsburgh Law School, Editor of *Crane's Cases on Damages.* Professor Crane led discussion on recent developments in the law of damages and also reviewed a series of leading cases.

■ The University of Colorado School of Law will sponsor an estate-planning conference in Boulder at the conclusion of the regular summer session, with registration commencing on August 29. The conference, which is to be attended by lawyers, trust officers and life insurance men,

will be conducted by Professor A. James Casner, of the Harvard Law School. The course will include a critical analysis of a completed estate plan prepared on the basis of a hypothetical fact situation. This plan will present for consideration income, estate and gift tax problems, the use of revocable and irrevocable *inter vivos* trusts, the settlement of life insurance proceeds, the importance of concurrently owned property, significant future interest problems, powers of appointment, the marital deduction, the disposal of business interests, administrative provisions used in wills and trusts and conflict of laws problems. The conference will last for a period of two weeks with room and board available on the campus for persons attending the conference.

■ Florida became the twenty-third state to have a judicial council by legislative enactment; five other states have a judicial council by constitution, court rule or other authority. Florida's council consists of seventeen members, nine of whom are laymen. Elwyn Thomas, Justice of the Supreme Court, has been appointed by Governor Dan McCarty as Chairman of the Council. At its first meeting the Council decided to consider the following matters: appellate courts and procedures to relieve the present congestion; a nonpartisan plan for the selection and tenure of judges; organization of and procedure in the trial courts; most effective use of jurors and other laymen; and administrative improvements in the judicial system.

■ The Florida Bar Association held its Annual Meeting in April at St.

Darry A. DAVIS

Petersburg. Featured throughout the three-day conference was a program of general interest to practicing attorneys. Speakers included Zelman Cowen, Dean of Law at the University of Melbourne, Australia, who spoke on "The Organization and Ethics of the British and American Legal Professions"; G. V. V. Nicholls, Q.C., Editor of *The Canadian Bar Review*, who spoke on legal draftsmanship; and Glenn R. Winters, Secretary of the American Judicature Society, whose subject was, "Whose Job Is Judicial Reform?" Principal speaker at the Annual Banquet was William J. Jameson, President of the American Bar Association.

Officers for 1954-1955 are Darrey A. Davis, Miami Beach, *President;* Donald K. Carroll, Jacksonville, *President-Elect;* Thomas H. Barkdull, Jr., Miami Beach, *President, Junior Bar Section,* and Elmer O. Friday, Jr., Orlando, *President-Elect of the Junior Bar Section.*

■ Several recent addresses by J. Wesley McWilliams, President of the Pennsylvania Bar Association, have been of noteworthy interest. Mr. McWilliams in an address entitled, "The Lawyer and the Bar Association", commented upon the relationship between a lawyer and organized lawyers and the public. He reiterated the cardinal principles set forth in the five-point program of the American Bar Association; that is, the preservation of representative government by education and understanding; the promotion, establishment and continuation of furnishing of legal services to all citizens within their means; the improvement of the administration of justice; the maintenance of high standards of legal education and professional qualifications; and the promotion of peace through the development of a system of international law consistent with American rights and liberties. Mr. McWilliams commented upon the ever-present problem of judicial backlog. He stated: "The judiciary of the state should be so integrated as to constitute a unified system with the Supreme Court exercising administrative control over each court. It is unfair and uneconomic for one judge to be overworked and another with much idle time on his hands. Court procedures must be improved, and the abuses of administrative agencies must be checked by a fearless and independent judiciary."

The Yellowstone County Bar Association and the Billings Chamber of Commerce recently honored President William J. Jameson at a dinner in Billings. Among those present were the Julius J. Wuerthners, of Great Falls, and Chief Justice and Mrs. Campbell C. McLaurin, of the Supreme Court of Alberta. Shown (left to right) are Mrs. Wuerthner, Mr. Wuerthner, Mrs. McLaurin, Mr. Jameson, Mrs. Jameson and Chief Justice McLaurin.

Great Falls Tribune

Practicing lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe • Editor-in-Charge

ANTITRUST: In the January issue of the *Yale Law Review* (Vol. 63) there is an article by Alfred E. Kahn, the Cornell economics professor, entitled "A Legal and Economic Appraisal of the 'New' Sherman and Clayton Acts" (pages 293-347); a piece by Professor Walter Adams, of the Michigan State Economics Department, entitled "The 'Rule of Reason': Workable Competition or Workable Monopoly?" (pages 348-370); a note by Roe of Yale (pages 372-388) entitled "Intra-Enterprise Conspiracy Under the Sherman Act" which deals with the liability of a corporation for conspiracy under Section 1 of the Sherman Act when it conspires only with its subsidiaries or its officers; a note by Doe of Yale on the *Times-Picayune* case (345 U.S. 594 and 63 *Yale L. J.* 389-398), and finally, a note by George Spelvin of Yale (pages 399-407) entitled "The Investment Bankers Case: The Use of Semantics To Avoid the Per Se Illegality of Price Fixing" in which Spelvin bitterly attacks the decision of Harold Medina (Civil No. 43-757, S.D. N.Y. October 14, 1953), saying "no amount of judicial semantics can change the fact that underwriters and dealers have agreed to maintain a fixed price for the securities they severally own during the period of distribution" and "Judge Medina's view that the members of the syndicate are merely performing a service for this issuer, is, at best irrelevant." (Address: 401A Yale Station, New Haven, Conn. $2.00). The Government has declined to appeal the investment bankers case so the Yale note will not get a Supreme Court reading. The assistant to trust-buster Judge Stanley N. Barnes, Edward P. Hodges, delivered a paper at the Fall Institute of the South Carolina Bar Association entitled "Restraints of Trade and Unfair Competition" and it is reprinted in the December, 1953, issue of the *South Carolina Law Quarterly* (Vol. 6—pages 124-167; address: Columbia, S. C., price $1.00). D. Gordon Blair of Ottawa, Ontario, has an interesting piece entitled "Combines, Controls or Competition" in the December, 1953, issue of the *Canadian Bar Review* (Vol. 31—pages 1083-1115; address: 88 Metcalfe St., Ottawa, Ontario, Canada—price $1.50). This is a valuable study for American lawyers advising as to Canadian business.

CLASS SUITS AND INTERPLEADER: The California Conference of State Bar Delegates in 1952 decided to investigate the desirability of adopting the federal rules and a Conference committee asked the *Stanford Law Review* to "undertake a study which would compare the present California practice with the probable results which would follow from an adoption of the Federal Rules". The December, 1953, issue prints the first two studies, one on "Class Suits", the other on "Interpleader", (Vol. 6—pages 1-2, 120-152, address: Stanford, California, price $1.25).

CORPORATIONS: In the April issue, at page 336, referring to the Yale note on *Schwarz* v. *General Aniline*, 305 N. Y. 395, in which the Court of Appeals denied Schwarz his litigation expenses when the criminal antitrust case against him as Director was nolle prossed, the reference was inadvertently dropped. It is 63 *Yale Law Journal*, No. 2, December, 1953, pages 253-259; address: 401 A Yale Station, New Haven, Connecticut. Price $2.00 for a single copy.

Gordon v. *Elliman*, 280 A.D. 655, 116 N. Y. Supp. 2d 671, noted in 38 *Cornell Law Quarterly* 244, a case which held that a derivative stockholder's suit to compel the declaration of a dividend was subject to New York's Franklin Wood law, so that plaintiff would have to post security for costs if he owned less than 5 per cent of the stock or stock worth less than $50,000, has been affirmed.

FAIR TRADE: Does the McGuire Act apply to an integrated manufacturer such as Eastman Kodak that both manufactures and sells at retail? Richard Roe of Columbia asks this in the February issue of the *Columbia Law Review* (Vol. 54—pages 282-287, Kent Hall, Columbia University, New York, 27, N. Y. Price $1.25). By a close vote, the F.T.C. held not in *Eastman Kodak Co.*, 3 C.C.H. Trade Reg. Rep. ¶11, 1972, 1953) as was foreshadowed in *General Electric* v. *S. Klein on-the-Square*, 121 N.Y.S. 2d 37, 57. The decision is contrary to *Doubleday and Co.*, 3 C.C.H. Trade Reg. Rep. ¶11, 515, and the contrary result in the *Eastman* case results from the fact that "the fifth commissioner was sitting, while the one who had voted with the Chairman in Doubleday was not". The Chairman and the fourth commissioner in the Doubleday case "required . . . a finding that the publisher entered into the contracts primarily in his capacity as a retailer rather than as a manufacturer". The note is well done. The Department of Justice of Canada has published a report as to resale price maintenance in Quebec that can be had for the asking at Ottawa, Ontario, Canada. Address Director MacDonald at the Combines Commission.

OUR YOUNGER LAWYERS

Thomas G. Meeker, Secretary and Editor-in-Charge, New Haven, Conn.

Law School Placement Survey

■ The first objective of the Conference Committee on Lawyer Placement for the current year was to determine what placement facilities presently exist. The study was divided into three fields: (a) law schools, (b) bar associations and (c) commercial agencies. The American Law Student Association Committee on Placement, under the direction of Don Steiner, of the University of Michigan Law School, surveyed the bar associations, and the results of its work have been made available to the JBC Placement Committee. The Chairman of that Committee, John E. Nagle, of Davenport, Iowa, has passed it along for this department. The survey of the law schools was made by Professor John O'Byrne, of the College of Law of the State University of Iowa, and the following is his preliminary report.

■ The law school placement survey questionnaire was sent to the deans of all law schools in the United States listed by the Association of American Law Schools and the American Bar Association. The response was very encouraging. At this writing returns have been received from eighty-seven of the 108 schools approved by the Association of American Law Schools, from eight of the additional fourteen schools approved by the American Bar Association (but not approved by the Association of American Law Schools) and from thirteen of the forty law schools that are listed by the American Bar Association but not approved.

While final tabulations have not been completed, enough work has been done to suggest the "placement" pattern in the law schools. "Placement" is in quotation marks because the committee realizes that the word means different things to different people. Professional or full-time placement personnel take the view that they "aid" or "counsel" the applicant and bring applicants and prospective employers together. They insist that the applicant "places" himself, that the placement service merely facilitates the operation. Others are less reticent and regard their offices as "placing" individuals in positions. "Placement service" can mean a list of jobs on a bulletin board posted as received. It can mean a separate office actively seeking out opportunities and rendering every service short of psychiatric treatment to the applicant. The committee has not been overly concerned with such variations except where problems of terminology obscured the goal of the survey.

From the limited preliminary study of the data, it is clear that there is a vast range in the tempo of placement activities from school to school and from area to area. The large national law schools have active placement functions directed by personnel who are able to devote substantial time, effort and organization to the work. In the smaller, more localized law school, the placement function becomes more informal, handled as additional duty by the dean, assistant dean or another member of the faculty. A few larger schools have administrative personnel to handle the function. In a few cases, placement is handled by the university or college placement service or bureau. In a few cases, the responses stated that there was no placement service at all.

One part of the questionnaire sought information about the persons who use the service and those who do not use the service. A relatively rigid pattern appears from the data. The current graduate receives most of the attention. Recent graduates of the school in all cases *may* use the service, but the record of such use is spotty. Few responses list the service as available to older graduates (over ten years out of school) and these indicate very little activity. It is probably true that the graduate's connection with the placement function is lost well before ten years. Virtually no school is prepared to state that it will service graduates of other schools. In a few instances, it is indicated that they might do it as a matter of courtesy or in the event that no graduate of their own school could be found to fill a request.

It is interesting, but not surprising, to note how localized our law schools are. With the exception of the large national law schools, the area into which students go is generally the area in which the law school has its immediate roots, usually the city or state in which it is located.

The comments added by respondents to the bare questionnaire indicate that there is a definite trend toward greater activity in the placement field. More record keeping, more counseling, more solicitation of employer use of the service, inauguration of regular mailings, preparation of brochures detailing the service generally or offering the year's specific wares—all are mentioned. Several schools report that their activities are new or recently established and seek information about the experience of others. In many cases where placement has been a regular function for current graduates, additional attention is being given to the recent graduate with some experience.

Most respondents regard their operation, whatever it may be, as successful. It is only fair to say that those deepest in the function are less inclined to report success. The questionnaire did not deliberately seek such opinions, but the comments generally brought it out. Where success of operation was commented upon in detail, it appeared that placement services are more likely

to be used by business firms, banks, government and large law firms. It is the common opinion that the smaller law firm waits for the knock on the door, or, if it seeks aid, it seeks through personal, confidential channels. This may account for the emphasis placed by many respondents upon counseling, *i.e.*, advising the student about the general types of opportunity that may exist, showing him how to look for a job, helping to sharpen this thinking about what he wants to do and generally building up his confidence for the search.

Reaction varies on the advisability of a bar association placement service. A majority seems to think that a national service would not be practical, but that a statewide service might be of help. Most respondents indicated that if such a service was available they would use it, although a few candid souls pointed out that it would be used only if the law school service could not otherwise serve the applicant.

With a number of very substantial exceptions, placement generally is informal, with the emphasis placed primarily upon the "clearing house" function. Formalization of the function is increasing and this trend will probably continue.

Bar association attention might be given to ways and means of aiding and augmenting law school placement activities, in developing techniques to locate opportunities that might be available, in providing for the student who seeks opportunities beyond his law school's locus of influence, and in further study of the problem of "re-placement" of the graduate with experience.

Books for Lawyers

(Continued from page 616)

two things of a general nature very clear. First, it was the extreme diversity of Hamilton and Jefferson which enabled the country itself to take a middle course that was the only one which could have preserved the United States in these years, and prepare them for the distinguished future services that they were to render to this country and the world. Second, he makes it clear, as I think no other historian does, that the country was constantly on the verge of actual destruction during this whole period, both from violent and divergent politics within and from real attacks from abroad. Other authors have stated these things, of course, but I think none have presented the evidence as this book does to show the convincing details of these grave dangers.

But I am one of these old-fashioned fellows who wants something more than brilliant writing and an amazing amount of detailed evidence on points that hitherto have been left to vague affirmations. Perhaps I even worry that there was not more generalization and less marshalling of quotations and evidence.

With all due respect, I think the author's method tends to crush the moral elements that would assist a truly just presentation of the whole subject. Burr was a voluptuary. He was a politician interested in gaining office who contributed no significant policy or idea to the development of our country. True, Hamilton and Jefferson engaged in their full share of petty politics, but this did not put them on the level of Burr. Hamilton and Jefferson did contribute great and important policies for which our country owes much of its strength and high quality, and our country will continue to be in their debt as long as it has worthy life of any kind. The author submerges their high qualities in trivial details. Neither they nor Washington himself appear as great men. This seems to me serious. They were great men and Burr was not. Perhaps the author's conscientious devotion to detail has been won at too great a price. It must be said that I am an unregenerate creature and that I growl at most modern writing somewhat along the same line as I have here. I deplore this modern staccato banging out of words, events and antagonisms. I regret the ignoring of the great lives, and the heroic achievements of the great men themselves.

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Charles B. Nutting, Editor-in-Charge

Legislative Drafting: A Challenge to the Legal Profession

by **Reed Dickerson**

■ The author of the following article has for the past year been in charge of the military codification program in the General Counsel's Office, Department of Defense.

> I will venture to affirm, that what is commonly called the *technical* part of legislation, is incomparably more difficult than what may be styled the *ethical*. In other words, it is far easier to conceive justly what would be useful law, than so to construct that same law that it may accomplish the design of the lawgiver.
>
> John Austin, *Jurisprudence* (4th ed., Campbell, 1879) 1136

■ Middleton Beaman,[1] long time Legislative Counsel of the House of Representatives and generally acknowledged Heifetz of American draftsmen, was asked several years before he died why he had not written a book on legislative drafting. Although his reply that he would not know what to put in it was belied by his earlier performances before a congressional committee[2] and the American Association of Law Libraries[3], the fact remains that America's top draftsmen have been singularly reticent about sharing their working tools and basic insights.

It would be hard to exaggerate the importance of knowing how to prepare an adequate legal instrument. This is particularly true of statutes. Sound government depends upon legislation that says the right thing in the right way, in language that is as clear, simple and accessible as possible. There must be draftsmen who can provide these things with the least friction and delay.

Good draftsmen are badly needed. This is not generally realized because the drafting skill is more subtle and copes with problems more difficult than surface appearances suggest. Legal drafting, like teaching, looks easy. But, as with teaching, the answers are rarely clear cut. The test of success is usually someone's individual judgment.

Legal drafting is not for children, amateurs or dabblers. It is a highly technical discipline, the most rigorous form of writing outside of mathematics. Few lawyers have the special combination of skills, aptitudes and temperament necessary for a competent draftsman. This is due partly to inadequate training.[4] More fundamental is the widespread misunderstanding of what adequate draftsmanship involves.

One of the most baffling aspects of the problem is the difficulty of convincing those in whose hands the solution lies that the problem is hard and, even more basic, that any problem exists.[5] I have discussed the matter with many lawyers, government officials and law professors. I rarely meet one who does not consider himself a well-trained, and even expert, draftsman. That the average lawyer or law professor senses little inadequacy either in himself or among bar members generally may explain the condescension they often show.

Actually, the legal profession is falling far below its real potentialities, not only in the highly specialized field of legislative drafting but in the general field (which touches every lawyer) of preparing contracts, wills, leases and conveyances. Basic ability is not hard to find. Basic ability adequately trained is rare.

It is time to drop the threadbare rationalization that the complexities and uncertainties of most completed legal work inhere in the complexities and uncertainties of the substantive problems they deal with. The substantive demands of concrete problems is no excuse for introducing unncessary complexities and uncertainties. Today there are ways of separating the avoidable from the unavoidable.

Because it is the legislator's job to enact laws, it is sometimes assumed that election to Congress or a state legislature is, without more, sufficient background from which to draft legislation. But whether a legislator has the capacities to draft legislation depends entirely upon other factors. Although it is certainly his privilege to draft the bills he introduces, few members have the time. That few also have the inclination is fortunate, because it frees them for matters of basic policy and the countless needs of their constituents.[6] The typical legislator relies almost entirely on others for his bill drafting: members of his staff; professional staff members of legislative committees; official bill-drafting services;[7] staff attorneys in the executive departments and independent agencies;[8] persons representing private institutions and trade associations; and finally individual lawyers and individual laymen. Unfortunately many of these are not equal to the job.

Like much state law, the existing body of federal statutory law is an intricate mass of live and dead law. It is a vast tower of Babel. Much of

1. Jones, "Middleton Beaman: Doctor of Laws", 35 *A.B.A.J.* 778 (1949).
2. Hearings on H. Con. Res. 18, Joint Committee on the Organization of Congress, 79th Cong., 1st Sess., 413-430 (1945).
3. "Bill Drafting", 7 *Law Lib. J.* 64 (1914).
4. "Few practitioners and fewer law teachers have experience in legislative advocacy or legislative draftsmanship". Horack, "Objectives in the Field of Legislation", 6 *J. Leg. Ed.* 18, 20 (1953).
5. "It is believed that no real improvement in the quality of our statutes can be hoped for until our legislators and others responsible for the preparation and passage of bills realize that all the processes involved in converting a meritorious idea into an effective statute are equally important and that in each process experts must be employed." Beaman, *op. cit.* note 3, 66.
6. " . . . there are limits to human intelligence, even to the intelligence of a legislator, and that the legislator who thinks himself not only entitled but bound to put his finger into every legislative pie and to scrutinize every measure submitted for the approval of the body to which he belongs, may possibly be placing an exaggerated estimate both on his intelligence and on his responsibilities." Ilbert, *The Mechanics of Law Making* 198 (1914).
7. Jones, "A Note on Legislative Drafting Services in the State Legislature", 36 *A.B.A.J.* 142 (1950).
8. Jones, "Drafting of Proposed Legislation by Federal Executive Agencies", *A.B.A.J.* 136 (1949).

its terminology violates accepted usage. Much of the text is confused and ambiguous. It is full of gaps and overlaps.[9]

In the rush to meet the exigencies of particular problems, laws are proposed and frequently enacted that do not show how far they amend or supersede pre-existing laws. Others are proposed that do not dovetail adequately with related or companion legislation. Many show little regard for the need to develop a reliable means of communication between the legislator and the persons the legislation is addressed to. Common usage is too readily perverted by short cuts that save the draftsman's time but sooner or later lose untold hours for the individuals, agencies and courts that have to determine what the law means.

Some of this is unavoidable. And the fact that a particular law is badly drafted does not mean that its author is a bad draftsman. Many of the things that make for bad legislation are beyond the control of the persons who are charged with preparing it. Even so, many could be avoided if uniform writing conventions and the best modern principles of legal drafting were adopted and if legislative drafting were concentrated in persons with the necessary mental capacity, temperament and training.

Voices have recently been raised suggesting that the existing law can be greatly clarified, but a general preoccupation with the problem of style shows that adequate cures must await fuller diagnosis. The greatest need in existing legislation is not a more readable style but greater systematization and greater uniformity in concept, approach and terminology. Legislation cannot, of course, be permanently embalmed in static terminology. New laws should reflect the needs of the times. But the discrepancies in existing legislation are only partly traceable to normal growth. Many flow from accident, mistake, ignorance or ineptitude.

Normally, it is proper to assume that when Congress or a state legislature says different things it means different things, and that when it says the same thing in means the same thing. Experience shows, however, that it frequently enacts language that has been prepared by persons who pay inadequate attention to these assumptions. As a result, much of the law is unnecessarily hard to understand, both for itself and in its relationship to other enacted law. Terminology varies not only between different statutes dealing with the same subject but often within the same statute and sometimes even within the same section of the same statute.

Besides the minimum requirements of consistency, what is needed is a closer adherence to accepted usage, and where accepted usage does not give an unequivocal answer, the adoption of conventions within the limits of what accepted usage allows. Although the individual draftsman can do little about leading the governmental drafting procession as a whole, he can do his part by selecting from among the varying usages those which seem closest to general usage and good sense.

Suitable standards and conventions not only save the draftsman's time, but the time of private citizens, administrative officials and the courts. (It is safe to say that the lack of these things costs the Government and the public many millions of dollars annually.) More important, they improve the quality of the end product as a vehicle for carrying out the legislative will. Sound legislative approaches, consistency and clearness are tools for eliminating errors of substance or omission that would otherwise remain hidden until after enactment.

For the Federal Government, much of the responsibility rests with Congress and the executive agencies. Members of Congress, individually and collectively, can have a much larger proportion of the bills now drafted on Capitol Hill prepared either by the highly capable lawyers of the offices of the Legislative Counsel or by skilled specialists attached to the various committees.

The executive agencies, for their part, can centralize and co-ordinate their drafting activities more fully. They can pay greater attention to the problems of getting trained personnel. Where they cannot acquire it ready-made, they can develop adequate training programs.

The law schools, too, have an important responsibility. They can help to develop those general skills which form such an important part not only of legislative drafting but of many other kinds of legal craftsmanship.[10] Unfortunately, their justifiable preoccupation with the disciplines of analysis have led them to

9. " . . . the laws which have found their various ways into the statute books of English-speaking countries . . . are spoken of as disgraceful, unworkmanlike, defective, unintelligible, abounding in errors, ill-penned, inadequate, loosely worded, depraved in style, peculiar absurdities, mischievous, baneful in influence—and besides, in their making 'technical skill is often below the mark.' Otherwise, it might be presumed, they are all that could be asked of them—but no, in other writings we find that they are uncertain, confusing, obscure, ill-expressed, ambiguous, overbulky, redundant, entangled, unsteady, disorderly, complex, to say nothing of being 'uncognoscible'." "Guide to Legislative Drafting in Arizona", Arizona Newsletter No. 15, 9 (1941).

"The English lawyer, more especially in his character of parliamentary composer, would, if he were not the most crafty, be the most inept and unintelligent, as well as unintelligible of scribblers. Yet no bellman's verses, no metrical effusion of an advertising oil-shop, were ever so much below the level of genuine poetry, as when, taken for all in all, are the productions of an official statute-drawer below the level of the plainest common sense." 3 Bentham, *Nomography* (Bentham's Works, Bowring's ed., 231, 242 (1843).

10. " . . . drafting is the most important phase of the average lawyer's work." Thomas, "Problems in Drafting Legal Instruments", 39 *Ill. B.J.* 51, 57 (1950).

neglect the disciplines of synthesis, the skills involved in weaving complicated materials into an intelligible whole.[11]

Filling this gap does not necessarily mean adding new subjects to already overloaded curricula. What is needed is to work into existing subject matter the kind of legal engineering for which brief writing, term papers and law review experience are an inadequate substitute. There is no better gymnasium for flexing this kind of intellectual muscle than the field of drafting documents that mark out legal rights, privileges, duties and functions.[12]

Finally, the Bar itself can improve the constructive skills of many of its members by practicing individual self help, by publishing helpful materials and by exploiting such devices as the practitioners' institute.

Can the legal profession develop lawyers who are as capable as craftsmen as they are as analysts, who can put complicated materials together as well as they can take them apart? Only by meeting this challenge can it adequately discharge its responsibilities in the great complex of modern society.

11. "The lawyer's treatment of the law is analytical, the legislator's constructive." "Report of the Special Committee on Legislative Drafting", 38 *A.B.A.Rep.* 622, 629 (1913).

12. Traditional courses in "legal writing" are usually overbalanced with brief writing or other forms of concise legal essay that are a watered-down substitute for the more concentrated disciplines. A man trained in drafting legislation can be made qualified to write an adequate brief more quickly than a man trained in brief writing can be made qualified to draft adequate legislation. This is because the referential aspects of language, upon which legislation draws almost exclusively, are generally harder to master than the emotive, of which legislation ("free from all colour, from all emotion, from all rhetoric") has almost none. See Mackay, "Introduction to an Essay on the Art of Legal Composition Commonly Called Drafting", 3 *L. Q. Rev.* 326 (1887); Curtis, "A Better Theory of Legal Interpretation", in *Jurisprudence in Action*, 155 (1953). Compare Williams, "Language and the Law", 61 *L. Q. Rev.* 384, 387-401 (1945).

Moreover, as between legislation and other definitive legal documents, " . . . the number of contingencies that a lawyer has to guard against in the case of a will or contract, while sometimes they are very numerous, are mere flyspecks compared with the contingencies that must be considered in the case of a statute . . .". Beaman, *op. cit.* note 2, 419. "The textbook of Story on Equity Pleadings tells us that the drawing of a well-constructed bill in equity requires great accomplishments, and the endowments which belong only to highly gifted minds, and yet that is a summer-day pastime compared with the difficult task of framing a wise and well constructed bill for enactment into a law by a legislature." Beaman, *op. cit.* note 3, 65

THE DEVELOPMENT OF INTERNATIONAL LAW

Richard Young · Editor-in-Charge

Hungarian Plane Incident in the World Court

■ Under date of February 16, 1954, the Government of the United States filed with the Registrar of the International Court of Justice at The Hague two applications instituting proceedings in that Court against the Governments of the Union of Soviet Socialist Republics and of the Hungarian People's Republic respectively. Inasmuch as both applications dealt with the same subject matter, it was requested that they be dealt with together insofar as it might be convenient and proper to do so.[1]

The action marked the most recent step in a prolonged controversy with the Soviet Union and Hungary over their treatment of an American military aircraft and its crew which landed in Hungary in the fall of 1951. The incident, which attracted great attention at the time, became the subject of much correspondence and debate among the three governments, with the United States seeking unsuccessfully to obtain satisfaction for the misconduct, as it asserted, of the two Communist countries. The facts in the case, as alleged by the United States in notes of March 17, 1953, to the Soviet and Hungarian governments which were annexed to the applications to the Court, are summarized in the following paragraphs.

On November 19, 1951, a United States Air Force C-47, with a crew of two officers and two enlisted men, left Erding, Germany, on a routine cargo flight to Belgrade, Yugoslavia. There were no passengers and neither plane nor personnel were armed. By unforeseen high winds of which the crew was unaware, the plane was blown off course in Hungary and Rumania. Realizing he was lost, the pilot eventually turned westward; and as the fuel supply ran low, signals for assistance were made both by radio and with lights. About 6 P.M. the plane was intercepted by a Soviet aircraft shortly before it would have crossed from Hungary into Austria and escorted to a landing near Papa in Hungary, some eighty miles west of Budapest. Only then did the American airmen learn that they had been flying over Hungary.

The C-47 and its contents were seized, and the four Americans were separately detained and interrogated by Soviet military authorities in Hungary from November 19 to December 3. They were then turned over to the Hungarian authorities, and the men were conveyed to Budapest and lodged in prison. On Sunday morning, December 23, they were informed by a military prosecutor that they were under arrest and held for trial on charges of having violated the Hungarian frontier.

1. The text of the application with respect to the Soviet Union is printed (but without annexes) in 30 *Department of State Bulletin* 450-451 (March 22, 1954).

Each accused was shown a list of eight names from which to choose a defense lawyer; if he failed to indicate a choice, one was selected for him by the prosecutor.

Some five minutes after the last accused had been introduced to his counsel, the trial commenced before a military tribunal. It was held in secret. The proceedings, in Hungarian, were translated only in summary by a police interpreter. Except for a few brief answers by the accused to questions on non-incriminating matters, no evidence was offered or taken during the trial. Defense counsel made no effort to challenge the jurisdiction of the court, to introduce evidence on behalf of the accused, to attack the prosecution's case, to raise questions of law or to take any steps toward appeal or review.

About seven hours elapsed from the time the prosecutor first notified the prisoners of the charges against them to the time the tribunal finished reading its judgment. The accused were all found guilty, heavily fined and the airplane confiscated. To secure the release of the four, the United States a few days later paid to the Hungarian government the sum of $123,605.15. In accordance with stipulations by Hungary, payment was made in dollars from sources outside Hungary. Release was effected on December 28, 1951.

Throughout their detention the airmen were refused permission to communicate with American diplomatic or consular officers in Hungary. Indeed, it was not until December 3 that American officials learned from Soviet press and radio reports what had become of the missing plane and crew. Between November 19 and December 3 an extensive search had been made, and specific requests for any information about the plane had been addressed by the American Legation in Budapest to the Hungarian authorities. In response to these inquiries, the Hungarian Foreign Office had denied any knowledge concerning it.

In the controversy which ensued, the Soviet Union and Hungary denied the veracity of the foregoing account and alleged that the plane had entered Hungary intentionally and for illegal purposes, with cargo packed for dropping by parachute. They further claimed that the subsequent proceedings were a matter solely of domestic jurisdiction; that they were conducted in accordance with law; and that there was no basis for diplomatic complaint about the sentence of the four airmen, since they had failed to take advantage of their right to appeal. The Soviet Government also contended that the action of its aircraft in taking the C-47 to Papa was "in strict accordance with the duty of protecting the regular supporting communication lines with the Soviet occupation zone in Austria" which had been established under authority granted in Article 22 of the treaty of peace with Hungary.[2]

In its notes of March 17, 1953, the United States went on to specify a number of the violations of international law which in its view arose out of the conduct of the Soviet and Hungarian governments. It may be inferred that these charges will resemble those to be advanced by the United States in any proceedings before the Court if the case is ever heard on the merits. Certain items alleged the violation by Hungary, with the aid and incitement of the Soviet Union, of provisions of two treaties; others claimed violations by both countries of generally accepted rules of international law.

The two treaties cited were the treaty of peace with Hungary of February 10, 1947 (to which both the U.S.S.R. and the United States are parties)[3] and the Hungarian-American treaty of friendship, commerce and consular rights signed at Washington on June 24, 1925, and revived after the war by the United States in accordance with provisions in the treaty of peace.[4] Particular reference was made to Article 2 of the former treaty and Articles 1, 14, 18 and 19 of the latter.

Article 2 of the treaty of peace bound Hungary to take all measures necessary to secure to all persons under Hungarian jurisdiction the enjoyment of human rights and fundamental freedoms. The cited articles of the 1925 treaty granted general permission for nationals of one party to enter and travel in the territory of the other subject to "all local laws and regulations duly established"; provided for consular officers and for their treatment with high consideration by all authorities of the receiving state; and expressly declared that consular officers might address those authorities "for the purpose of protecting their countrymen in the enjoyment of their rights accruing by treaty or otherwise".

Among actions by the Soviet Union alleged in the United States notes to constitute breaches of duties under general international law were the arrest and detention of airmen

2. Soviet note of June 19, 1953.
3. 61 Stat. 2065.
4. 44 Stat. 2441. On July 5, 1951, the United States had given the one year's notice required for terminating this treaty, but this period had not expired at the time of the plane incident.

and an aircraft in distress, the subjection of the airmen to excessively long and arduous interrogation, and the failure to return the plane and contents to their rightful owner. Similar charges were made with respect to the actions of Hungary, plus charges that the criminal proceedings against the airmen constituted a "flagrant and manifest denial of justice" contrary to the requirements of international law. The notes, after specifying these actions in detail, asserted that they constituted

> legal and actionable wrongs to the United States for which the Soviet Government and the Hungarian Government are jointly and separately responsible.

Damages were therefore demanded from the two governments in the sum of $637,894.11, plus interest, itemized as follows:

Value of plane and contents	98,779.29
Fine paid under protest	123,605.15
Damages to the four airmen	200,000.00
Damages to the United States	215,509.67

In its applications to the Court, the United States asked for damages in the same amount, for such other reparation and redress as the Court might deem proper and for an award of costs. But any proceedings on the merits of the dispute must depend upon establishment of the Court's jurisdiction in the premises. This is a point of considerable difficulty.

It was proposed in the United States notes that if the Soviet or Hungarian governments contested their liability, the matter should be submitted to the International Court. To facilitate this in the absence of any outstanding declaration by either of those governments accepting the compulsory jurisdiction of the Court under Article 36 (2) of its statute, the United States invited them either to file an appropriate declaration with the Court or to enter into a special agreement submitting the controversy to its decision under Article 36 (1).[5]

This invitation having met with no favorable response from the addressees, the United States undertook to bring the matter before the Court by unilateral action. In its applications it recited that the dispute involved matters of the kind specified in paragraphs (a) through (d) of Article 36 (2). It further asserted that, although neither the Soviet Union nor Hungary appeared to have filed any declaration thus far, each was qualified to do so, and that upon notification by the Registrar of the United States application, each might take the necessary steps to confirm the Court's jurisdiction.

The reasoning behind the applications was thus explained in an announcement by the Department of State on March 5, 1954:[6]

> While customarily, in the past, cases have been brought before the International Court of Justice under special written agreements between the disputing governments or on the basis of prior declarations by both governments accepting the Court's jurisdiction, the Court's rules and the Court's jurisprudence permit a complaining government to file an application unilaterally upon the premise that the defendant government will tacitly or by its own unilateral declaration agree to a hearing of the dispute by the International Court of Justice. This method was left open for cases where the defendant government might have been unwilling to join in any preliminary agreement with the complaining government or to file a formal declaration accepting jurisdiction in advance of the dispute itself being brought before the Court by the complaining government but where it was nevertheless willing to appear and defend a proceeding instituted against it.

Whether or not the United States's position is well taken, it appears to be without precise precedent in the practice of the Court. Presumably an appropriate response from either the Soviet or Hungarian governments would serve to perfect the jurisdiction of the Court as between the United States and the responding government, and the matter could then follow the usual course of procedure in such cases. In the absence, however, of such a response, it would seem difficult for matters to go further, and the United States applications would then prove abortive. No definite answer is yet at hand; while the applications are reported to have been duly transmitted by the Registrar to the Soviet and Hungarian governments, as well as to all governments entitled to appear before the Court, no reply is known to have been received up to the time of writing. Ample time must naturally be allowed for this purpose before any further developments can be expected.

5. Article 36 (1) and (2) of the Court's statute reads:

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;

b. any question of international law;

c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.

6. 30 *Department of State Bulletin* 449 (March 22, 1954).

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